No. 05-1589 (19)
Vide 05-1657
Title: Gary Davenport, et al., Petitioners
v.
Washington Education Association
Docketed: June 14, 2006
Lower Ct: Supreme Court of Washington
Case Nos.: (74268-5, 74316-9)
Decision Date: March 16, 2006
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 13 2006	Petition for a writ of certiorari filed. (Response due July 14, 2006)
Jul 10 2006	Order extending time to file response to petition to and including August 14, 2006.
Aug 14 2006	Brief of respondent Washington Education Association in opposition filed. VIDED.
Aug 23 2006	Reply of petitioners Gary Davenport, et al. filed.
Aug 30 2006	DISTRIBUTED for Conference of September 25, 2006.
Sep 26 2006	Petition GRANTED. The case is consolidated with No. 05-1657 and a total of one hour is allotted for oral argument.
Oct 31 2006	SET FOR ARGUMENT ON Wednesday, January 10, 2007.
Nov 7 2006	Brief amicus curiae of Campaign Legal Center filed. VIDED.
Nov 7 2006	Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
Nov 8 2006	Brief amicus curiae of National Federation of Independent Business Legal Foundation filed. VIDED.
Nov 8 2006	Brief amici curiae of Evergreen Freedom Foundation, et al. filed. VIDED.
Nov 8 2006	Brief amicus curiae of Institute for Justice filed. VIDED.
Nov 8 2006	Joint appendix filed. VIDED.
Nov 9 2006	Brief of petitioners Gary Davenport, et al. filed.
Nov 13 2006	Brief amicus curiae of American Educators filed. VIDED.
Nov 13 2006	Brief amicus curiae of American Legislative Exchange Council filed. VIDED.
Nov 13 2006	Brief amicus curiae of United States filed. VIDED.
Nov 13 2006	Brief amicus curiae of Mackinac Center for Public Policy filed. VIDED.
Nov 13 2006	Brief amici curiae of Cato Institute, et al. filed. VIDED.
Nov 17 2006	CIRCULATED.
Nov 30 2006	Extension of time within which to file respondents' brief on the merits to and including December 15, 2006. VIDED.
Dec 4 2006	Motion of the Solicitor General for leave to participate in oral argument as

	amicus curiae and for divided argument filed. VIDED. (Distributed)
Dec 4 2006	Motion for divided argument and for additional time for oral argument filed by petitioners Gary Davenport, et al. VIDED.
Dec 11 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 11 2006	Motion for divided argument and for additional time for oral argument filed by petitioners DENIED.
Dec 12 2006	Record received from Supreme Court of Washington. (3 boxes)
Dec 15 2006	Brief amici curiae of American Federation of Labor and Congress of Industrial Organizations, et al. filed. VIDED. (Distributed)
Dec 15 2006	Brief of respondent Washington Education Association filed. VIDED. (Distributed)
Jan 3 2007	Reply of petitioners Gary Davenport, et al. filed. (Distributed)
Jan 10 2007	Argued. For petitioners: Robert M. McKenna, Attorney General, Olympia, Wash.; and Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: John M. West, Washington, D.C.

Supreme Court, U.S.
FILED
051589 JUN 13 2006
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

GARY DAVENPORT, MARTHA LOFGREN,
WALT PIERSON, SUSANNAH SIMPSON,
AND
TRACY WOLCOTT,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR WRIT OF CERTIORARI

*MILTON L. CHAPPELL
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 321-8510

STEVEN T. O'BAN
Ellis, Li, & McKinstry PLLC
Two Union Square
601 Union St., Suite 4900
Seattle, WA 98101-3906
(206) 682-0565

Counsel for Petitioners
**Counsel of Record*

June 2006

QUESTIONS PRESENTED

I. Do labor union officials have a First Amendment right to seize and use for politics the wages of employees who have chosen not to become union members?

II. Does a state campaign finance law that prohibits labor unions and their officials from seizing and using the wages of nonmembers for partisan political campaigns without obtaining the nonmembers' affirmative consent violate the First Amendment rights of labor unions?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below:

Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, Tracy Wolcott, and the Washington Education Association.

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

I. The Facts 3

II. The Proceedings Below 4

REASONS FOR GRANTING THE WRIT 8

I. The Washington Supreme Court's Decision That Labor Unions Have a Constitutional Right to Seize and Use the Wages of Nonmembers Conflicts with Decisions of This Court and Numerous Decisions of the United States Courts of Appeals and State Courts 10

TABLE OF CONTENTS-CONT.

Page

II. The Washington Supreme Court's Decision, That the State's Campaign Finance Law Prohibiting Labor Unions and Their Officials from Seizing and Using Nonmembers' Wages for Partisan Political Campaigns Without Obtaining Their Affirmative Consent Violates the First Amendment Rights of Labor Unions, Conflicts with Decisions of the United States Court of Appeals for the Sixth Circuit 20

III. The Washington Supreme Court's Decision Also Conflicts with Relevant Decisions of This Court 25

CONCLUSION 30

APPENDICES

A. Opinion of the Supreme Court of the State of Washington - March 16, 2006 ..... 1a

B. Unpublished Opinion of the Court of Appeals of Washington - June 24, 2003 ..... 42a

C. Order of the Superior Court of the State of Washington - January 18, 2002 ..... 45a

D. Opinion of the Court of Appeals of Washington - June 24, 2003 ..... 50a

TABLE OF CONTENTS-CONT.

Page

E. Order of the Superior Court for the State of Washington - May 10, 2001 ..... 77a

F. Constitutional and Statutory Provisions 81a

TABLE OF AUTHORITIES

Cases ***Page***

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 5, 7, 8, 21

American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949) 17

Arkansas State Highway Employees Local 1315 v. Kell, 628 F.2d 1099 (8th Cir. 1980) 15

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 25, 26, 27, 30

Babbitt v. United Farm Workers National Union,
442 U.S. 289 (1979) 15

Brown v. Alexander,
718 F.2d 1417 (6th Cir. 1983) 11, 13

California Medical Association v. FEC,
453 U.S. 182 (1981) 23

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) 3, 8, 19, 24

City of Charlotte v. Local 660, International Association of Firefighters, 426 U.S. 283 (1976) 11

FEC v. Beaumont,
539 U.S. 146 (2003) 26, 27

TABLE OF AUTHORITIES-CONT.

Page

FEC v. National Education Association,
457 F. Supp. 1102 (D.D.C. 1978) 16, 28

FEC v. National Right to Work Committee,
459 U.S. 197 (1982) 25, 27, 29, 30

Finney v. Hawkins,
189 Va. 878, 54 S.E.2d 872 (1949) 18, 19

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 25

Fraternal Order of Police v. Mayor & City Council,
916 F.2d 919 (4th Cir. 1990) 14

Jacobus v. Alaska,
338 F.3d 1095 (9th Cir. 2003) 23

Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.,
335 U.S. 525 (1949) 17, 19

Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.,
149 Neb. 507, 31 N.W.2d 477 (1948),
aff'd, 335 U.S. 525 (1949) 18

Machinists v. FEC,
678 F.2d 1092 (1982) 21, 23, 26

TABLE OF AUTHORITIES-CONT.

Page

Machinists v. Street,
367 U.S. 740 (1961) 6, 7

Madsen v. Women's Health Center,
512 U.S. 753 (1994) 22

Mariani v. United States,
212 F.3d 761 (3d Cir. 2000) 30

Mascari v. Teamsters,
187 Tenn. 345, 215 S.W.2d 779 (1948) 18

McConnell v. FEC,
540 U.S. 93 (2003) 14, 25, 26, 30

Michigan State AFL-CIO v. Employment Relations Commission, 453 Mich. 362, 551 N.W.2d 165 (1996) 15

Michigan State AFL-CIO v. Miller,
215 F.3d 1327 (6th Cir. 2000), 2000 WL 712539 .. 23

Michigan State AFL-CIO v. Miller,
103 F.3d 1240 (6th Cir. 1997) 20, 21, 23

Michigan State AFL-CIO v. Miller,
891 F. Supp. 1210 (E.D. Mich. 1995),
rev'd, 103 F.3d 1240 (6th Cir. 1997) 21

TABLE OF AUTHORITIES-CONT.

Page

Philadelphia Fraternal Order of Correctional Officers v. Rendell,
1997 WL 1161146 (3d Cir. 1997) 16, 17

Pipefitters v. United States,
407 U.S. 385 (1972) 26, 27

Railway Clerks v. Allen,
373 U.S. 113 (1963) 6

Railway Employes' Department v. Hanson,
351 U.S. 225 (1956) 17

Regan v. Taxation with Representation of Washington,
461 U.S. 540 (1983) 25

Smith v. Arkansas State Highway Employees,
441 U.S. 463 (1979) 13, 14, 25

South Carolina Education Association v. Campbell,
883 F.2d 1251 (4th Cir. 1989) 13

State v. Alaska Civil Liberties Union,
978 P.2d 597 (Alaska 1999),
cert. denied, 528 U.S. 1153 (2000) 23

Toledo Area AFL-CIO Council v. Pizza,
154 F.3d 307 (6th Cir. 1998) 15, 21, 24, 25

TABLE OF AUTHORITIES-CONT.

Page

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994) 22

United States v. Boyle,
482 F.2d 755 (D.C. Cir. 1973) 28, 30

United States v. CIO,
335 U.S. 106 (1948) 27

United States v. O'Brien,
391 U.S. 367 (1968) 22

Washington Education Association v. Smith,
96 Wash. 2d 601, 638 P.2d 77 (1981) 26

Constitutions, Statutes, and Rules

United States Constitution,
amend. I ..... *passim*
amend. XIV 2

Federal Election Campaign Act of 1971, 2 U.S.C.
§ 431 *et seq.* 26
§ 441b(a) 25, 27, 28
§ 441b(b)(3) 28
§ 441b(b)(3)(A) 27, 28
§ 441b(b)(4)(A)(ii) 25, 28

TABLE OF AUTHORITIES-CONT.

Page

28 U.S.C.
§ 1257(a) 1
§ 2403(b) 2

National Labor Relations Act, 29 U.S.C.
§ 159(e). 10
§ 164(b) 10

Alaska Stat.
§ 15.13.074(f) (LexisNexis 2004) 28
§ 15.13.135 (LexisNexis 2004) 28

Ariz. Rev. Stat. Ann.
§ 16-919(B) (West Supp. 2005) 28
§ 16-920 (West Supp. 2005) 28
§ 16-921 (West Supp. 2005) 28

Cal. Gov't Code
§ 3515.7(d) (West Supp. 2006) 10
§ 3546(d)(1) (West Supp. 2006) 10

Cal. Pub. Util. Code
§ 99566.1(d)(1) (West Supp. 2006) 10

5 Ill. Comp. Stat. Ann. 315/3(g) (West 2005) 9

115 Ill. Comp. Stat. Ann. 5/11 (West 1998) 9

Iowa Code Ann. § 20.26 (West 2001) 28

TABLE OF AUTHORITIES-CONT.

Page

Md. Code Ann., Elec. Law
§ 13-242 (LexisNexis Supp. 20052002) 28
§ 13-243 (LexisNexis 2002) 28

Md. Code Ann., Educ.
§ 6-504(b) (LexisNexis Supp. 2005) 9
§ 6-504(d)(1)(LexisNexis Supp. 2005) 9
§ 6-504(d)(3)(iv)(1) (LexisNexis Supp. 2005) 9
§ 6-504(d)(3)(iv)(2) (LexisNexis Supp. 2004) 9

Mich. Comp. Laws Ann.
§ 169.254 (West 2005) 28
§ 169.255 (West 2005) 28

Minn. Stat. Ann. § 179A.06(3) (West Supp. 2006) 10

Mont. Code Ann.
§ 39-31-402(3) (2005) 9
§ 39-32-109(2)(d) (2005) 9

Neb. Rev. Stat. Ann.
§ 49-1469 (LexisNexis Supp. 2005) 28
§ 49-1469.06 (LexisNexis Supp. 2005) 28

N.J. Stat. Ann. § 34:13A-5.5(b) (West Supp. 2005) 10

N.M. Stat. Ann. § 10-7E-4(J) (Michie Supp. 2003) 10

TABLE OF AUTHORITIES-CONT.

Page

N.C. Gen. Stat. Ann.
§ 163-278.19(a) (LexisNexis 2005) 28
§ 163-278.19(b) (LexisNexis 2005) 28

N.D. Cent. Code
§ 16.1-08.1-03.3 (LexisNexis Supp. 2005) 28

Ohio Rev. Code Ann.
§ 3517.082 (West Supp. 2006) 28
§ 3599.03 (West Supp. 2006) 28
§ 3599.031(A) (West Supp. 2006) 28

Okla. Const. Art. 23, § 1A 10

Pa. Cons. Stat. Ann.
§ 1101.1701 (West 1991) 28
§ 1102.2 (West Supp. 2005) 10
§ 1102.4 (West Supp. 2005) 10

S.D. Codified Laws Ann.
§ 12-25-1(1) (LexisNexis Supp. 2003) 28
§ 12-25-2 (LexisNexis Supp. 2003) 28

Utah Code Ann.
§ 20A-11-1403 (LexisNexis Supp. 2005) 28
§ 20A-11-1404 (LexisNexis Supp. 2005) 28

Vt. Stat. Ann. tit. 3,
§ 902(19) (LexisNexis 2003) 10
§ 1011(4) (LexisNexis 2003) 10

TABLE OF AUTHORITIES-CONT.

Page

Wash. Rev. Code,
RCW 41.04 26

Washington Public Employees Collective Bargaining Act,
RCW 41.56.122(1) 3

Washington Educational Employment Relations Act,
RCW 41.59.100 3

Washington Fair Campaign Practices Act, § 760,
RCW 42.17.760 ..... *passim*

Wis. Stat. Ann.
§ 11.29 (West 2004) 28
§ 111.02(10m) (West 2002) 10
§ 111.70(1)(n) (West Supp. 2002) 10
§ 111.81(16) (West Supp. 2005) 10
§ 111.70(2) (West 2002) 10
§ 111.85(2)(a) (West 2002) 10

Wyo. Stat. Ann.
§ 22-25-102 (LexisNexis 2005) 28
§ 22-25-102(h) (LexisNexis 2005) 28

Federal Election Commission Regulations, 11 C.F.R.
§ 114.5(a) 28
§ 114.5(a)(1) 28
§ 114.5(g)(2) 28

TABLE OF AUTHORITIES-CONT.

Page

Supreme Court Rule,
13.1 1
29.4(b) 2
29.6 ii

Other Authorities

Lillian R. Bevier, *Specious Arguments, Intractable Dilemmas*,
94 Colum. L. Rev. 1258 (1994) 24

Petitioners Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcott respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered on March 16, 2006.

OPINIONS BELOW

The opinion of the Washington Supreme Court, Appendix ("App.") A, *infra* 1a, is reported at 130 P.3d 352 (Wash. 2006). That opinion decided two consolidated cases: the instant case, *Davenport v. Washington Education Association,* docket number 74316-9 in the court below; and *State ex rel. Public Disclosure Commission v. Washington Education Association* ("*PDC*"), docket number 74268-5. The unpublished opinion of the Washington Court of Appeals in *Davenport*, App. B, *infra* 42a, is reported at 117 Wash. App. 1035 (2003). The decision of the trial court in *Davenport*, App. C, *infra* 45a, is not reported. The decision of the Washington Court of Appeals in the consolidated case, *PDC*, App. D, *infra* 50a, is reported at 117 Wash. App. 625, 71 P.3d 244 (2003). The decision of the trial court in *PDC*, App. E, *infra* 77a, is not reported.

JURISDICTION

The Washington Supreme Court entered judgment on March 16, 2006. The petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). Although in *Davenport* neither the State of Washington nor any agency, officer, or employee thereof is a party, the Public Disclosure Commission, which is an agency

of the State, is a party to the consolidated case below, *PDC*. Accordingly, 28 U.S.C. § 2403(b) may apply and this initial document shall be served on the Attorney General of the State of Washington. The notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution and the Washington Fair Campaign Practices Act, § 760; RCW 42.17.760. *See* App. F, *infra* 81a.

STATEMENT OF THE CASE

This case presents the question whether a state campaign finance statute that requires labor union officials to get a **nonmember's** affirmative consent before using the nonmember's wages for partisan political campaigns violates the First Amendment rights of labor unions and their members.

Respondent Washington Education Association ("WEA"), a labor union, was the defendant in both consolidated cases below. In *PDC*, WEA challenged the constitutionality of § 760 of the Washington Fair Campaign Practices Act in its motion for summary judgment at the trial court. The trial court found § 760 constitutional. App. E at 78a. The WEA appealed that ruling to the court of appeals, which held § 760 unconstitutional because its "affirmative authorization requirement unduly burdens unions." App. D at 69a.

In *Davenport*, the court of appeals reversed and remanded Petitioners' suit for dismissal "[b]ecause we hold today in [*PDC*] that RCW 42.17.760 is unconstitutional[. Thus]

plaintiffs, as non-objecting, nonunion employees, lose standing to sue for their un-refunded agency fees." App. B at 43a. Davenport and the State separately petitioned for review in the Washington Supreme Court, defending the constitutionality of § 760. App. A at 2a, 7a.

I. The Facts

Petitioners are five current or former public educators who are not members of the monopoly bargaining representative, WEA. Nonmembers are required by statute, RCW 41.59.100 and RCW 41.56.122(1), to pay fees to the union that equal member dues. A portion of members' dues and nonmembers' fees goes to support political and ideological causes that are unrelated to the union's collective bargaining activities. App. A at 2a-3a, 6a.

However, Washington's campaign finance law, RCW 42.17.760, prohibits unions from using the compulsory fees seized from the wages of any nonmember on political campaigns, unless the nonmember has affirmatively authorized such use. App. F at 81a. The WEA stipulated with the PDC that it had violated § 760 by failing to get the affirmative authorization of all nonmembers before using their fees for political purposes. App. A at 5a.

The WEA developed its "*Hudson*" process[1] to address the fact that the dues-equivalent fees charged nonmembers exceed what the WEA needs for collective bargaining. App. A at 3a-4a. These excess fees are referred to in the case law and in the WEA's "*Hudson*" process as "nonchargeable expenses."

---

[1] This process stems from the guidelines stated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

App. A at 3a. Nonchargeable expenses include and exceed the political contributions covered by § 760. *Id.*

Only if a nonmember timely objects to the fees charged does the WEA refund to that person the percentage of the fees that it considers nonchargeable. *Id.* at 3a-4a. Nonmembers who fail to file a timely objection receive no rebate and must subsidize the nonchargeable expenses, including the political campaigns covered by § 760. App. A at 4a. At issue are the fees nonobjecting nonmembers paid that WEA used for partisan political campaigns without the nonmembers' affirmative authorization.[2]

II. The Proceedings Below

In March 2001, Petitioners brought this class action law suit to recover agency shop fees that the WEA collected and used for partisan political purposes without the nonmembers' affirmative authorization, in violation of RCW 42.17.760. App. A at 6a.

In their complaint, Petitioners alleged an implied private right of action under § 760, and three tort claims: conversion, fraudulent concealment, and breach of fiduciary duty. App. A at 6a. Petitioners sought a refund of that portion of nonmembers' fees used for political expenditures in violation of § 760. The WEA moved to dismiss. The trial court denied the motion, except as to the breach of fiduciary duty claim. The trial court also determined the applicable statute of limitations and certified Petitioners' class. Finally, the trial court stayed further proceedings pending an interlocutory appeal. App. A at 6a; App. C at 47a-49a.

---

[2]The Washington Supreme Court construed § 760 "as requiring more than a nonresponse to a *Hudson* packet." App. A at 11a.

The WEA sought discretionary review of the trial court's denial of its motion to dismiss. Division II of the court of appeals accepted review. At the WEA's request, the court of appeals set oral argument both for this case and *PDC* before the same panel.[3] In light of holding § 760 unconstitutional in *PDC* on June 24, 2003, that same day a majority of the court of appeals panel in *Davenport* reversed the trial court and remanded for dismissal of Petitioners' claims. App. A at 6a-7a.

The 2-1 appellate majority recognized that the "only authority that a union has to compel nonmembers to pay agency fees is statutory." App. D at 57a. Yet they found the campaign finance law unconstitutional because § 760's affirmative authorization requirement, or "opt-in procedure, upset[s] the balance between nonmembers' rights and the rights of the union and the majority," "ignores a union's right to use non-objectors' agency fees on political expenditures," and "unduly burdens unions." App. D at 68a, 69a.

Then Chief Judge Hunt dissented. She noted that this Court's propositions that an "opt in" provision is not constitutionally required[4] do not support the converse, *i.e.*, that an "opt

---

[3]Prior to the commencement of *Davenport*, the Public Disclosure Commission, through the Attorney General, brought a civil enforcement action against the WEA in superior court for violations of § 760. During the PDC's pre-filing investigation, the WEA admitted in a written stipulation to violations of RCW 42.17.760. After a two-week bench trial, the trial court found that the WEA violated § 760, awarded the State $200,000, and then doubled that amount based on its finding that the WEA intentionally violated the law. A 2-1 majority of the court of appeals panel reversed the trial court based on the conclusion that § 760 is unconstitutional. App. A at 4a-6a; App. D at 53a-57a, 69a.

[4]*See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36, 237-38, 244

(continued...)

in" provision such as Washington's is constitutionally barred. App. D at 71a. She also noted that none of this Court's agency fee decisions held "that the Constitution *mandates* that [the] burden [of objecting] rest[s] on the employee." *Id.* at 73a.

Both the State and the *Davenport* plaintiffs timely petitioned for review in the Washington Supreme Court. The court granted both petitions for review, consolidated the two cases, and in a 6-3 decision affirmed the court of appeals' holding that § 760 is unconstitutional. App. A at 7a, 29a. The majority found that the campaign finance statute imposes an unconstitutional restriction on the political speech of the union, its members, and its nonmembers.

> [T]he statute is unconstitutional because its requirement of affirmative authorization amounts to an impermissible presumption that each nonmember objects to the union's use of his or her fees for political activities. * * * [B]y presuming the dissent of nonmembers, § 760 upsets the **balance** of members' and nonmembers' constitutional rights in the context of a union's expenditures for political activities.

App. A. at 16a (emphasis added).

Chief Justice Sanders, joined by two other justices, strongly dissented:

> The majority turns the First Amendment on its head. Unions have a statutory, not constitutional, right to

---

[4](...continued)
(1977); *Railway Clerks v. Allen*, 373 U.S. 113, 121-22 (1963); *Machinists v. Street*, 367 U.S. 740, 770, 772-74 (1961).

cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount. Absent this statutory mechanism for the withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223 * * *.

* * *

From the majority's misconstruction of the "dissent is not to be presumed"[5] language a false "balance" requirement is invented. Other than general paeans to the right of association, the majority cites no other precedent for its holding that the "balance" between the associational rights of dissenters and non-dissenters is upset by requiring one to register assent, rather than register dissent. Again, if the elimination of a payroll deduction does not abridge the constitutional rights of union members and nonobjecting nonmembers to associate, it is inconceivable that requiring assent as a precondition to using funds generated by a payroll deduction abridges such rights.

* * *

But there is *no* association between the union and agency fee payers because by definition these individuals have refused to join (associate with) the union. The absence of membership defeats any claim that the regulation of statutorily required monetary support can possibly violate the right of union members to freely associate with one another for political advocacy. Rather it puts in jeopardy the

---

[5] *Abood*, 431 U.S. at 238; *Street*, 367 U.S. at 774.

> First Amendment right of nonmembers to refuse to associate with a union which uses their money to advance a political agenda with which they might disagree. *That* is the concern of the First Amendment in this context, as it is the even more protective concern of RCW 42.17.760.

App. A at 30a, 36a-37a (footnote omitted), 40a-41a (emphasis in original).

REASONS FOR GRANTING THE WRIT

Without any support on point from this Court, a majority of the Washington Supreme Court concocted, from the statutory privileges granted labor unions to seize and use nonmembers' wages, a "constitutional right," under color of the First Amendment, for unions to spend those fees for partisan politics unless the nonmember affirmatively "opts out" by invoking a union's *Hudson* procedures. Thus, this Court's *Hudson* protections have been transmogrified from a First Amendment shield for nonunion employees into a First Amendment sword for unions.

The majority below erroneously turned the shield this Court provides nonmembers from the full reach of statutes compelling them to financially support all of the unions' varied activities[6] into a dagger piercing the State's statutory protection of nonmembers from involuntarily supporting the unions' partisan political campaigns. This turning of the First Amendment on its head was based on nonexistent "constitutional rights" of union officials and members. *See infra* pp. 10-20.

---

[6] *Hudson*, 475 U.S. at 301-11; *Abood*, 431 U.S. at 234-36.

Never before has a court suggested that a campaign finance statute requiring unions to secure the affirmative consent of **nonmembers** before using their compelled moneys on partisan politics violates a union's freedom of association, because freedom of association has never before been interpreted as broadly as the courts did below. The majority's decision striking down the "opt in" requirement that limited the union's unfettered use of the compelled wages of nonmembers for politics as violative of the First Amendment did not misapply a properly stated rule of law, it turned the First Amendment rule of law on its head.

Moreover, the majority's holding assumes that unions have a "constitutional right" to an "agency fee" equivalent to full union dues from all represented employees, members and nonmembers alike, as long as unions allow dissenting nonmember employees to "opt out" of the unions' political spending. Accordingly, unless reversed by this Court, the decision below jeopardizes numerous federal and state statutes that limit or prohibit a union's unfettered collection and use of nonmembers' coerced fees, including statutes governing campaign finance,[7] compulsory unionism,[8] and the Right to

---

[7] *See infra* pp. 25-26, 28 & note 22.

[8] Like Washington's campaign finance law, some states' compulsory unionism statutes require voluntary political contributions to be separate from the compelled fee. 5 Ill. Comp. Stat. Ann. 315/3(g) (West 2005); 115 Ill. Comp. Stat. Ann. 5/11 (West 1998). Others prohibit the use of nonmember fees on political activities or contributions. Md. Code Ann., Educ. § 6-504(d)(3)(iv)(2) (LexisNexis Supp. 2004); Mont. Code Ann. §§ 39-31-402(3), 39-32-109(2)(d) (2005). Unlike Washington, not all state compulsory unionism statutes allow the union to compel nonmembers to pay an amount equal to dues. Some limit the amount to the costs of representing the members of the bargaining unit, Md. Code Ann., Educ. §§6-504(b), (d)(1) & (d)(3)(iv)(1) (LexisNexis Supp. 2005). Others limit

(continued...)

Work[9]. These jeopardized statutes have all been previously upheld by this Court or various state and federal courts against similar First Amendment attack.[10]

I. The Washington Supreme Court's Decision That Labor Unions Have a Constitutional Right to Seize and Use the Wages of Nonmembers Conflicts with Decisions of This Court and Numerous Decisions of the United States Courts of Appeals and State Courts.

The decision below is in direct conflict with this Court's holdings that unions and individuals who associate with them have no First Amendment associational right to monopoly (collective) bargaining or payroll deduction of full union dues (and, by logical extension, nonmember agency fees).

---

[8](...continued)
the fee to no more than 85% of dues. Minn. Stat. Ann. § 179A.06(3) (West Supp. 2006); N.J. Stat. Ann. § 34:13A-5.5(b) (West Supp. 2005); Vt. Stat. Ann. tit. 3, §§ 902(19), 1011(4) (LexisNexis 2003). Still others limit the fee to the constitutionally chargeable amount. N.M. Stat. Ann. § 10-7E-4(J) (Michie Supp. 2003); Pa. Cons. Stat. Ann. §§ 1102.2 & 1102.4 (West Supp. 2005). Some even allow the bargaining unit members to rescind or deauthorize the compulsory unionism requirement, Cal. Gov't Code §§ 3515.7(d), 3546(d)(1) (West Supp. 2006); Cal. Pub. Util. Code § 99566.1(d)(1) (West Supp. 2006); Wis. Stat. Ann. §§ 111.02(10m), 111.70(1)(n) & (2), 111.85(2)(a) (West Supp. 2002), 111.81(16) (West Supp. 2005); *see also* 29 U.S.C. § 159(e).

[9]*See* Sections 9(e) and 14(b) of the National Labor Relations Act, 29 U.S.C. §§ 159(e) and 164(b) (providing for deauthorization of compulsory unionism requirements and state prohibitions of such requirements by Right-to-Work provisions); Okla. Const. Art. 23, § 1A; and the twenty-one other constitutional and statutory Right-to-Work provisions listed in App. A at 31a n.3.

[10]*See infra* pp. 10-20.

In *City of Charlotte v. Local 660, International Association of Firefighters,* 426 U.S. 283 (1976), this Court held that the First Amendment imposes no obligation on the government to deduct union dues (or fees) from public employees' wages. As Chief Justice Sanders notes in his dissent: "Should the legislature of the State of Washington choose to repeal the mandatory withholding provisions [dues checkoff], there would be no constitutional impediment to doing so. **And no party to this proceeding claims there is.**" App. A at 31a (emphasis added).

Nevertheless, the majority struck down § 760 of the State's campaign finance law, which merely requires labor unions to secure the affirmative authorization of nonmembers before using the nonmembers' mandatory fees for political campaigns, as a violation of the unions and their members' First Amendment right of association. The majority mistakenly believed that this Court's holdings, involving the **constitutional rights of nonunion employees** who dissent to the use of their fees for politics, that nonmembers are adequately protected by an opportunity to "opt out" of paying for those activities means that the **First Amendment rights of unions and their members** are violated if the State further protects nonmembers by a statute that requires an "opt in" provision before their fees can be used for politics.

If a law prohibiting dues checkoff for a union does not violate the right of association,[11] a law that merely places a procedural requirement before unions can use nonmembers' mandatory checkoff for politics surely cannot violate the unions' First Amendment rights. The existence of a constitutional floor protecting First Amendment rights of nonmembers

---

[11] *See Brown v. Alexander,* 718 F.2d 1417, 1421-22 (6th Cir. 1983).

does not provide unions with constitutional rights that this Court has found do not exist for unions and their members. As Justice Sanders explained in his dissent:

> Given that the legislature could constitutionally repeal the whole statutory scheme allowing withholding in the first place, I find it nearly beyond comprehension to claim that the legislature, or the people acting through their sovereign right of initiative, could not qualify these statutes to ensure their constitutional application.
>
> In short, the majority turns the First Amendment on its head to invalidate a state statute enacted to further protect the constitutional rights of nonunion members who are required to pay agency fees as the price of their employment.
>
> * * *
>
> [I]t would be perfectly constitutional if the State chose to eliminate the payroll deduction for collection of agency shop fees altogether. How then could merely placing a procedural condition on the collection of a small portion of such shop fees (those that would be used to influence an election or to operate a political committee) violate the constitution?
>
> **The majority chooses not to address this line of cases.** Instead it distorts cases delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree to do the opposite: limit the State's ability to protect such dissenters.

App. A at 32a, 33a-34a (emphasis added).

The majority also found that § 760 violates the First Amendment rights of unions and their members, because it believed that the statute's "opt in" requirement limited the unions' efficiency in raising and using nonmembers' fees for politics. App. A at 16a-18a, 27a-29a. In holding that unions are not entitled to payroll deductions, the Fourth and Sixth Circuits, in conflict with the majority below, found that such impairment does not violate the First Amendment.

The Fourth Circuit admitted that the loss of payroll deductions could impair the effectiveness of a union in representing its members and result in less money for engaging in First Amendment protected lobbying activities, legal advocacy, and other programs. *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1256 (4th Cir. 1989). Nevertheless, "such 'impairment' * * * is not one that the First Amendment proscribes," because the constitution does not entitle unions to the funds necessary to realize all the advantages of First Amendment freedoms. *Id.* at 1257 (citing *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979)). The state's decision not to subsidize the free association and free speech rights of the union and its members did not infringe these rights. *Campbell*, 883 F.2d at 1257.

The Sixth Circuit in *Brown v. Alexander*, 718 F.2d 1417, 1421, 1423, 1429 (6th Cir. 1983), held that even if denial of payroll deductions, which the statute conferred on one union but not another, burdened the deprived union, "such a burden in the form of 'impairing the effectiveness' of plaintiff local unions was constitutionally permissible * * *." *Id.* at 1421 (citation omitted).

Just as dues checkoff is not a fundamental right, collective bargaining is not guaranteed by the First Amendment. *Smith*, 441 U.S. at 464-65 & n.2. Although the First Amendment

rights of association and advocacy protect the right of unions to exist and the right of employees to join together in unions and to advocate, those rights cannot be stretched to impose an obligation on the government to recognize a union, bargain with it, or allow the union to process grievances. *Id.* Requiring unions to get the affirmative authorization of nonmembers to use their compelled fees for politics does not impede the right to join together in a group of like-minded individuals and exercise free speech rights.

This Court found that First Amendment rights were not involved or violated in a state's refusal to deal with a union over member grievances. *Id.* at 464. Likewise, § 760's requirement that unions secure the affirmative authorization of nonmembers before using their compelled fees for partisan political campaigns neither prevents union membership nor voluntary participation with the union. A law does not violate an organization's right of freedom of association just because the law makes more difficult, rather than prohibits, the organization's political fund raising. *See McConnell v. FEC*, 540 U.S. 93, 203-04 (2003).

The majority below is in conflict with two courts of appeals on this point. The Fourth Circuit upheld against First Amendment attack a city charter provision providing that no employee organization would be recognized as a bargaining representative for city employees. *Fraternal Order of Police v. Mayor & City Council*, 916 F.2d 919, 923 (4th Cir. 1990). The court of appeals concluded that the provision did not violate either the union or its members' First Amendment rights, as "the city officials were free to refuse to speak with whomever they chose – be it private individuals or representative associations." *Id.* Thus, there is no constitutional right to

bargain collectively[12] and statutes prohibiting monopoly bargaining do not violate the First Amendment.

The Eighth Circuit held that "the First Amendment does not impose any duty on a public employer **to affirmatively assist**, or even to recognize a union." *Arkansas State Highway Employees Local 1315 v. Kell*, 628 F.2d 1099, 1102 (8th Cir. 1980) (emphasis added).

While the power to persuade is protected by the First Amendment, the power to compel conformity (and financial support) is not. *Michigan State AFL-CIO v. Employment Relations Comm'n*, 453 Mich. 362, 370, 551 N.W.2d 165, 169 (1996). Section 760 does not impair the ability of individuals to participate in the partisan political contributions of unions, because it allows unions to persuade nonmembers to support the unions' partisan political spending and secure their affirmative authorization. It only reduces a union's power to compel financial political support from nonmembers through the "opt out" system that inherently fails to indicate voluntary support.[13]

---

[12]Collective bargaining is a statutory right. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 313-14 (1979). Collective bargaining as a statutory right requires both parties to confer in good faith – to listen to each other. The First Amendment does not. Moreover, public employees are not a protected class. *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 322 (6th Cir. 1998); *Michigan State AFL-CIO v. Employment Relations Comm'n*, 453 Mich. 362, 380, 381, 551 N.W.2d 165, 173 (1996).

[13] [A] look at some statistics in this case supports the conclusion that reverse check-off ["opt out"] results in some unknowing, and therefore, involuntary, [political] contributions. * * * Implicit in an exchange between counsel for [the union] and the Court that occurred during oral argument herein is an acknowledgment that something other than a willingness by the member to be associated with the

(continued...)

If an ordinance banning monopoly bargaining does not violate the associational right of unions and their members, how can a campaign finance law that merely requires unions to get the affirmative consent of nonmembers before using their compelled fees for political campaigns violate the First Amendment?

In an analogous case, the Third Circuit upheld against First Amendment attack by city employees a city ordinance denying them any mechanism to choose a different bargaining representative from the one designated in that ordinance thirty-six years earlier. *Philadelphia Fraternal Order of Corr. Officers v. Rendell*, 1997 WL 1161146 (3d Cir. 1997). Because "there is no constitutional right to bargain collectively," the court of appeals found "that the First Amendment's freedom of association provides [no] * * * right to choose a bargaining representative." *Id.* at *1, *3.

The Third Circuit also repudiated the theory underlying the court below's reliance on the "difficulties" § 760 might place on a union's ability to effectively obtain use of nonmembers' fees for political campaigns. "What appellants demand

---

[13](...continued)

union's political activities operates to make reverse check-off so advantageous to the union's funding mechanism. * * * [There] appears to be a curtain of indifference that envelopes the NEA's members when finances are involved. With respect to their dues, [the union] raise[s] this curtain through payroll deduction. While it is still up, they add to the deduction the additional dollar for their political action fund. Then through reverse check-off, they lower the curtain back around its members to cause that indifference to insulate the union from requested refunds. * * * In this Court's view, "knowing free-choice" means an act intentionally taken and not the result of inaction when confronted with an obstacle.

FEC v. National Educ. Ass'n, 457 F. Supp. 1102, 1107, 1108, 1109 (D.D.C. 1978).

is a Constitutional right to effective advocacy of their viewpoints. That right simply does not exist. 'The First Amendment * * * provides no guarantee that a speech will persuade or that advocacy will be effective.' * * * Moreover, not all means of expression have been foreclosed." *Id.* at *3 (citations omitted).

If the First Amendment does not guarantee effective advocacy, how can a campaign finance law that merely requires unions to get the affirmative consent of nonmembers before using their compelled fees for political campaigns violate the First Amendment? Although the Washington Supreme Court found such a violation, it never answered these questions, because it never discussed any of these cases or the settled rule of law they reflect.

The majority's decision also conflicts with this Court's decisions upholding state Right-to-Work laws that "were challenged as violations of the right of freedom of speech, of assembly, and of petition guaranteed unions and their members by the First Amendment." *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 528-31 (1949); *accord American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 540 (1949); *see also Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 233 (1956). Like the campaign finance law struck down by a majority below, "[n]othing in the language of the [Right-to-Work] laws indicates a purpose to prohibit speech, assembly, or petition." *Lincoln Fed.*, 335 U.S. at 530. As previously noted, § 760 allows a union to persuade nonmembers to support its partisan political spending and ensures that such support is voluntarily given by requiring affirmative authorization.

This Court specifically rejected the argument adopted by the majority below that the right to association entails an effective union movement and sufficient membership:[14]

> There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies * * * [or] a constitutional guarantee that none shall get and hold jobs except those who will join in * * * the assembly's plans. For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct [c]onforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly.[15]

Lincoln Fed., 335 U.S. at 531.

A union's making partisan political contributions clearly "affects the interests of other individuals and the general public." *Id.* Moreover, the union's constitutional right of

---

[14]The unions argued in *Lincoln Federal* that the right to a closed shop is:

> "indispensable to the right of self organization and the association of workers into unions" * * * [and] to achievement of sufficient union membership to put unions and employers on a full equality for collective bargaining[. Thus,] a closed shop is consequently "an indispensable concomitant" of "the right of employees to assemble into and associate together through labor organizations."

335 U.S. at 530 (citation omitted).

[15]*Accord Finney v. Hawkins*, 189 Va. 878, 881-84, 54 S.E.2d 872, 874-75 (1949); *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 149 Neb. 507, 519-21, 538, 31 N.W.2d 477, 485-86, 494 (1948); *Mascari v. Teamsters*, 187 Tenn. 345, 215 S.W.2d 779 (1948).

association does not provide a further constitutional right to use for politics the mandatory fees of nonmembers who have not undertaken the burden of "opting out" of partisan political contributions in response to the union's *Hudson* notice.

More than fifty years ago the Supreme Court of Virginia cogently observed:

> Legislation that protects the citizen in his freedom to disagree and to decline an association which a majority would thrust upon him on the ground that it knows what is best for him, does no violence to the spirit of our fundamental law. The protection of minorities is the boast of our institutions and a basis of their asserted superiority over totalitarian regimes. The results have demonstrated the value of the democratic process.

Finney v. Hawkins, 189 Va. 878, 888, 54 S.E.2d 872, 877 (1949). Sadly, in the early years of the 21st century, a majority of the Washington Supreme Court has failed to maintain our fundamental law.

Because unions have no constitutional right to compel nonmembers to pay fees, the State imposes no unconstitutional burden on unions when it regulates the relationship between unions and nonmembers or the amount of, or procedures for, agency fees. In other words, because "[t]he only authority that a union has to compel nonmembers to pay agency fees is statutory," App. D at 57a, the state can prohibit entirely or restrict that authority without interfering with a union's constitutional rights. *See Lincoln Fed.*, 335 U.S. at 529-31.

This Court has conclusively held that the First Amendment rights of labor unions and their members are not violated

by statutes that deny them 1) collective bargaining, 2) payroll deduction of union dues and fees, and 3) the ability to require all employees to either become a union member or pay union fees. Therefore, it is inconceivable how a campaign finance law which merely requires unions to get the affirmative authorization of **non**union employees who are compelled to pay fees to the union before using any of those forced fees on partisan politics violates the associational rights of unions and their **members**!

II. The Washington Supreme Court's Decision, That the State's Campaign Finance Law Prohibiting Labor Unions and Their Officials from Seizing and Using Nonmembers' Wages for Partisan Political Campaigns Without Obtaining Their Affirmative Consent Violates the First Amendment Rights of Labor Unions, Conflicts with Decisions of the United States Court of Appeals for the Sixth Circuit.

There is a direct conflict between the Washington Supreme Court in this case and the Sixth Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), concerning the constitutionality of similar campaign finance legislation. The district court in *Miller*, like the majority here, held that a state law requiring annual affirmative consent of union members[16] for checkoff contributions to a PAC violated the First Amendment rights of unions and their members,

---

[16]The Washington statute only applies the "opt in" requirement to nonmembers, while the Michigan statute applies it to members. However, this difference does not justify the decision of the court below, because if a statute requiring affirmative consent from members does not violate the First Amendment, the union's freedom of association certainly is not implicated by a statute requiring affirmative authorization from only **nonmembers**.

because nonmembers' rights are "appropriately protected" by the "opt out" procedures this Court mandated in *Abood*. *Michigan State AFL-CIO v. Miller*, 891 F. Supp. 1210, 1218 (E.D. Mich. 1995), *rev'd*, 103 F.3d 1240 (6th Cir. 1997).

The Sixth Circuit reversed, finding that the Michigan "opt in" statute did not violate any First Amendment rights of the unions or their members. *Miller*, 103 F.3d at 1250-53. It did so because the "opt in" provision was merely a reasonable regulation of the time, place, and manner of speech subject to the less-exacting intermediate scrutiny standard, not a content-based statute subject to strict scrutiny.[17] Rather than limiting any political expression, an "opt in" statute merely ensures that the political contributions to separate segregated funds by means of mandatory or automatic payroll deductions are voluntary.[18] *Id.* at 1251.

The standard of scrutiny to be applied to the campaign finance statute is another area of direct conflict between the Sixth Circuit and the majority below. The majority below

---

[17]The D.C. Circuit also applied an elevated (intermediate), but not strictest, standard to campaign finance restrictions that do not "directly * * * place limits on any individual's speech or participation in the electoral process." *Machinists v. FEC*, 678 F.2d 1092, 1106 (1982) (*en banc*); *see also id.* at 1107.

[18]Consistent with this Court's holding that unions have no constitutional right to payroll deduction for any reason, including for monopoly bargaining fees, the Sixth Circuit, in another case, held that "there is no constitutional right to wage checkoffs to support political causes." *Pizza*, 154 F.3d at 321-22. This holding is also in conflict with the majority's decision below that the First Amendment prohibits any regulation of the checkoff for partisan politics. If there is no constitutional right to wage checkoffs for political causes, there is no constitutional right to a political checkoff without regulations and conditions. But that is precisely what the majority below held.

improperly applied strict scrutiny, App. A at 22a-23a, 28a-29a, while the Sixth Circuit applied the intermediate scrutiny standard in accordance with this Court's clarification of the applicable tiers of review in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640-43 (1994); *see also Madsen v. Women's Health Center*, 512 U.S. 753, 763 (1994); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The majority below never claimed that § 760 restricts speech on the basis of content, which is a necessary finding for the application of strict scrutiny. By contrast, laws like § 760, "that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." *Turner Broad.*, 512 U.S. at 643.

The Sixth Circuit made the following findings directly contrary to those of the majority of the Washington Supreme Court on these similar "opt in" statutes:

> [T]he Michigan statute does not impose any direct limits on speech. It does not determine who can speak, how much they can speak, or what they may say. [The unions] may continue to raise just as much money now as they could before the annual consent requirement was made applicable to them. * * * Even if contributions were to decline, however, the cause would be the exercise of informed choice by individuals, not the governmental suppression of political advocacy. The governmental interest at stake here is striking a balance between the right to solicit political contributions and the co-equal right not to contribute, an interest wholly unrelated to the suppression of free speech.

Miller, 103 F.3d at 1253.[19]

Likewise, the Sixth Circuit found the administrative burdens of the "opt in" requirement to be minimal, while the majority below found them to be substantial:[20]

> An annual mailing to a union's contributing members, asking them to check a box and to return the notice to the union, would seem to suffice under the statute. Labor unions surely maintain some sort of records on their members already, and requiring the unions to make space in their files or databases for the inclusion of one more piece of information seems

---

[19]The Alaska Supreme Court also upheld its state campaign finance law prohibiting labor unions from making contributions to a political candidate, party, or committee against claims that the prohibitions offended the "political speech rights and associational rights of would-be contributors." *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 613 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000); *see also id.* at 608-13. In direct conflict with the majority below the Alaska Supreme Court found that restraints on campaign expenditures by corporations and labor unions have long been part of federal law, and long upheld. *Id.* at 608, 609, 610. The Ninth Circuit also upheld Alaska's ban on corporate and union contributions for similar reasons. *Jacobus v. Alaska*, 338 F.3d 1095, 1122 (9th Cir. 2003). The court did so partly because "[i]n the context of contribution limits, the requirement of 'close tailoring' does not require 'the least restrictive alternative.' *See, e.g., California Med. Ass'n* [*v. FEC*], 453 U.S. [182,] 199 n.20 [(1981)]." 338 F.3d at 1115.

[20]App. A at 16a-18a, 27a-29a. The Sixth Circuit subsequently noted that, although the unions paraded a host of "burdens" in securing the greatest number of contributors, the statute "does not impose any specific method of compliance," and those burdens, even if real, "do not violate the Constitution." *Miller*, 215 F.3d 1327, 2000 WL 712539, at *1, *2 (6th Cir. 2000) (unpublished opinion). "[T]he Constitution, as historically and currently interpreted, does not afford any guarantee against one person or group's ability to fund more speech than can another." *Machinists*, 678 F.2d at 1109.

> minimal, certainly a burden insufficient to rise to the level of a constitutional violation. Similarly, the suggestion that asking people to check a box once a year unduly interferes with the speech rights of those contributors borders on the frivolous.

Id.

In this case there is even less burden, because the union already has to notify all nonmembers annually of their *Hudson* rights. The union could simply include in that package the needed material to demonstrate affirmative consent. Moreover, the State conceded that § 760 does not require the affirmation to be in writing, App. A at 17a, so a telephone response could suffice.

As noted by the Sixth Circuit, another problem with the reasoning of the majority below, that any impairment of the ability of public employees and their unions to raise funds to promote their political agendas and favorite candidates violates the First Amendment, "is that it confuses what citizens and the associations they form may do to support and disseminate their views with what citizens and groups they form my *require* the government to do in this regard." *Pizza*, 154 F.3d at 319. What the unions and the majority below forget is that the First Amendment "'is a source of negative rights against the government, not a repository of positive entitlement to government favors.'" *Id.*, quoting Lillian R. Bevier, *Specious Arguments, Intractable Dilemmas*, 94 Colum. L. Rev. 1258, 1277 (1994).

The Sixth Circuit, not the majority below, is wholly consistent with this Court's cases acknowledging that the protections accorded to fundamental First Amendment rights do not extend to imposing a duty on the government to assist

the exercise of those First Amendment rights, no matter how much the lack of such assistance undercuts the effectiveness of exercising such rights. *See, e.g., Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983); *Smith*, 441 U.S. at 465-66; *Pizza*, 154 F.3d at 321.

III. The Washington Supreme Court's Decision Also Conflicts with Relevant Decisions of This Court.

The majority's decision below conflicts with the principles of various decisions of this Court upholding against First Amendment attack campaign finance statutes that place greater restrictions on a union's ability to use members and nonmembers' wages for partisan politics than the limited time, place, and manner regulation that is § 760's affirmative authorization requirement.

The Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 441b(a), prohibits making union political contributions and expenditures from general union funds. Instead, they must be made from a separate fund (or political action committee ("PAC")) "financed by voluntary contributions." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 671 (1990) (Brennan, J., concurring). Moreover, the FECA prohibits labor PAC solicitation of nonmember union employees. 2 U.S.C. § 441b(b)(4)(A)(ii). This Court has repeatedly upheld these prohibitions against First Amendment attack and spoken approvingly of them,[21] because the potential for disproportionate political influence of corporate and labor

---

[21] *See McConnell v. FEC*, 540 U.S. 93 (2003); *Austin*, 494 U.S. at 656 n.1, 661, 664-65 & n.4; *FEC v. National Right to Work Comm.*, 459 U.S. 197, 198-200 (1982); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

union participation in the political process justifies the regulation. *See Austin*, 494 U.S. at 660-61.

Only a complete ban on political expression, not its mere regulation, raises serious First Amendment concerns. *McConnell v. FEC*, 540 U.S. 93, 204 (2003); see also *Machinists*, 678 F.2d at 1105-07, 1112. Congress' power to prohibit corporations and unions from using their treasury funds for express advocacy in federal elections has been upheld because corporations and unions can form and administer separate segregated funds or PACs, which provide them "with a constitutionally sufficient opportunity to engage in express advocacy." *McConnell*, 540 U.S. at 203; *cf. Washington Educ. Ass'n v. Smith*, 96 Wash. 2d 601, 607-08, 638 P.2d 77, 80-81 (1981) (although RCW 41.04 prohibits voluntary payroll deductions for political contributions and impairs a union's ability to take political action, it is constitutional, because state workers can contribute to PACs by other means). Likewise, § 760 does not prevent unions from engaging in express advocacy, even with nonmembers' agency fees, if nonmembers merely authorize such.

Moreover, the PAC option allows corporate and union political participation "'without the temptation to use corporate [or union] funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure * * * **without jeopardizing the associational rights of advocacy organizations' members**.'" *McConnell*, 540 U.S. at 204 (quoting *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)) (emphasis added, citations omitted); *accord Pipefitters v. United States*, 407 U.S. 385, 402 (1972). In fact, the FECA, 2 U.S.C. § 431 *et seq.*, and related regulations that bar direct corporate and union contributions in

federal elections, are subject to relatively complaisant First Amendment review, only requiring that the provisions be closely drawn to match a sufficiently important governmental interest, rather than to strict scrutiny. *Beaumont*, 539 U.S. at 161-62.

In addition to preventing corruption or the appearance of corruption, the PAC system has always had a **further duty** and important governmental interest of protecting "the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *FEC v. National Right to Work Comm.* ("*NRWC*"), 459 U.S. 197, 208 (1982); *accord United States v. CIO*, 335 U.S. 106, 113 (1948); *see also Austin*, 494 U.S. at 673-78 (Brennan, J., concurring). Accordingly, the Act prohibits unions from financing political funds by "dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment." 2 U.S.C. § 441b(b)(3)(A); *accord* at § 441b(a).

Thus, in the federal system, the statutory protection of individual union members who might oppose the union leadership's political contributions is secured by prohibiting union treasury expenditures on federal elections and requiring voluntary donations from union members for political contributions, *see Pipefitters*, 407 U.S. at 402-13, not by the "opt out" procedure the panel majority required here. As this Court noted: "The dominant concern in requiring that contributions be voluntary was, after all, to protect the dissenting * * * union member." *Id.* at 414-15. Here, the State of Washington has not even gone that far. The State has only protected dissenting **nonmembers** by requiring that their contributions be voluntary.

Under current federal law, union political contributions can only be made from a union PAC, union member contributions to the PAC must be voluntary and knowingly and intentionally given, and the union and its PAC may **not** solicit **nonmembers.**[22] 2 U.S.C. §§ 441b(a), 441b(b)(3), 441b(b)(4)(A)(ii); 11 CFR §§ 114.5(a), 114.5(g)(2); *see also United States v. Boyle*, 482 F.2d 755, 763-64 (D.C. Cir. 1973); *FEC v. National Educ. Ass'n*, 457 F. Supp. 1102 (D.D.C. 1978). Moreover, the Federal Election Commission has specifically determined that an "opting out" system violates the Act. "[E]ven though [membership dues] are refundable upon request of the payor," they are still "monies required as a condition of membership in a labor organization or as a condition of employment," which the Act prohibits unions and their PACs from using for political contributions or expenditures. 11 CFR § 114.5(a)(1); *see also* 2 U.S.C. §§ 441b(a), 441b(b)(3)(A).

---

[22]Many states have similar campaign finance laws that restrict union political solicitations and contributions. *See* Alaska Stat. §§ 15.13.074(f), 15.13.135 (LexisNexis 2004); Ariz. Rev. Stat. Ann. §§ 16-919(B), 16-920, 16-921 (West Supp. 2005); Iowa Code Ann. § 20.26 (West 2001); Md. Code Ann., Elec. Law §§ 13-242 (LexisNexis Supp. 2005), 13-243 (LexisNexis 2002); Mich. Comp. Laws Ann. §§ 169.254, 169.255 (West 2005); Neb. Rev. Stat. Ann. §§ 49-1469, 49-1469.06 (LexisNexis Supp. 2005); N.C. Gen. Stat. Ann. §§ 163-278.19(a) & (b) (LexisNexis 2005); N.D. Cent. Code § 16.1-08.1-03.3 (LexisNexis Supp. 2005); Ohio Rev. Code Ann. §§ 3517.082, 3599.03 (West Supp. 2006); Pa. Cons. Stat. Ann. § 1101.1701 (West 1991); S.D. Codified Laws Ann. §§ 12-25-1(1), 12-25-2 (LexisNexis Supp. 2003); Utah Code Ann. §§ 20A-11-1403 (LexisNexis 2003), 20A-11-1404 (LexisNexis Supp. 2005); Wis. Stat. Ann. § 11.29 (West 2004); Wyo. Stat. Ann. § 22-25-102 (LexisNexis 2005). Some states require written authorization of political deductions. Ohio Rev. Code Ann. § 3599.031(A) (West Supp. 2006); Wyo. Stat. Ann. § 22-25-102(h) (LexisNexis 2005).

Congress' limitation of solicitation of campaign contributions to members of a corporation or union was specifically upheld unanimously by this Court against claims that it violated associational rights. "[W]e conclude that the associational rights asserted by [the corporation] may be and are overborne by the interests Congress has sought to protect in enacting [the Act]." *NRWC*, 459 U.S. at 207. Those interests include protection of

> individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. **We agree with the government that these purposes are sufficient to justify the regulation.**
>
> * * *
>
> We are also convinced that the statutory prohibitions and exceptions we have considered are sufficiently tailored to these purposes to avoid undue restriction on the associational interests asserted by [the corporation].

Id. at 208 (emphasis added, citations omitted). Moreover, as the Court noted, "[t]his careful legislative adjustment of the federal electoral laws * * * to account for the particular legal and economic attributes of corporations and labor organizations **warrants considerable deference**." *Id.* at 209 (emphasis added, citations omitted).

What this Court said about corporate wealth applies equally to union wealth because it too is accumulated with the help of the state, which sets the union up as the monopoly bargaining representative with the power to compel financial support from members and nonmembers alike. "Corporate

wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Austin*, 494 U.S. at 660.

In sum, Congress can constitutionally 1) prohibit unions from contributing to federal candidates from dues monies, 2) require union members' political contributions to be knowingly and voluntarily made, and 3) prohibit solicitation of political contributions from nonmembers without violating the First Amendment rights of unions, their members, and agency fee payers. *McConnell*, 540 U.S. at 203-04; *NRWC*, 459 U.S. at 207-09; *Mariani v. United States*, 212 F.3d 761, 770-75 (3d Cir. 2000); *Boyle*, 482 F.2d at 763-64. It necessarily follows that the State of Washington is not prohibited from placing time and place restrictions on a union's political use of the compelled fees of nonmembers.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted, and the case set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

*MILTON L. CHAPPELL
ELLIS, LI & McKINSTRY PLLC
By Steven T. O'Ban

ATTORNEYS FOR PETITIONERS
*Counsel of Record

June 13, 2006

APPENDICES

APPENDIX A

OPINION OF THE SUPREME COURT OF WASHINGTON

16 March 2006

[130 P.3d 352]

Supreme Court of Washington, En Banc.

STATE of Washington ex rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,
Petitioner,
v.
WASHINGTON EDUCATION ASSOCIATION,
Appellant,
Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcott, Petitioners, individually and on behalf of all other nonmembers similarly situated,
v.
Washington State Education Association, Respondent.

No. 74268-5, 74316-9.

Argued May 27, 2004.
Decided March 16, 2006.

* * * * *

[354]IRELAND, J.*

¶ 1 In these consolidated cases, we review RCW 42.17.760, which governs a labor union's ability to use agency shop fees, the fees paid by educational employees who are not union members. Both cases stem from an Evergreen Freedom Foundation (Evergreen) complaint with the Public Disclosure

---

* Justice Faith Ireland is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

Commission (PDC) that the Washington Educational Association (WEA) violated RCW 42.17.760 (hereafter § 760).

¶ 2 In the first consolidated case, the trial court found that WEA had intentionally violated § 760 and assessed $590,375 in penalties and costs. The Court of Appeals reversed, holding that RCW 42.17.760 is unconstitutional. We affirm the Court of Appeals.

¶ 3 In the second consolidated case, plaintiffs contend that chapter 42.17 RCW provides them a private right of action to recover for violations of § 760. Plaintiffs also assert tort claims based on violations of § 760. The trial court agreed that § 760 provides a private right of action, but the Court of Appeals reversed because it had held § 760 unconstitutional. The Court of Appeals remanded the case for dismissal. We affirm the Court of Appeals.

FACTUAL BACKGROUND

¶ 4 WEA is the exclusive bargaining agent for approximately 70,000 Washington State educational employees. Membership in WEA is voluntary. However, both members and nonmembers must contribute to WEA for the costs related to collective bargaining.[1] Per statute, members pay dues to the union;

---

[1] It is well settled that a union, which is obliged to act on behalf of all employees in the bargaining unit, may charge nonunion employees to bear their fair share of the costs of the representation. *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 118 S.Ct. 1761, 140 L.Ed.2d 1070 (1998). The dissent takes pains to point out that many states have passed so called "right to work laws" which have not been held unconstitutional. This argument is irrelevant to the issue in this case and inconsistent with

(continued...)

nonmembers pay agency shop fees, which are equivalent to member dues. RCW 41.59.100[2]; RCW 41.56.122.

¶ 5 A portion of members' dues goes to support political and ideological causes, which are unrelated to the union's collective bargaining activities on behalf of all employees. These expenses are typically called nonchargeable expenses. Nonmembers who do not wish to support these nonchargeable activities may obtain a rebate of that portion of their fees that was used for nonchargeable activities. The process by which the union rebates this amount to dissenting nonmembers was established by the United States Supreme Court in *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

¶ 6 Twice each year, WEA sends a "*Hudson* packet" to each non-member. The *Hudson* packet includes a letter notifying the employee of his or her right to object to paying fees for nonchargeable expenditures. The packet gives the nonmember three choices: (1) pay agency shop fees equivalent to 100 percent of dues; (2) object to paying 100 percent and receive a rebate of nonchargeable expenditures, as calculated by WEA; or (3) object to paying 100 percent and challenge

---

[1] (...continued)
"Washington's long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.,* 140 Wash.2d 291, 300, 996 P.2d 582 (2000).

[2] RCW 41.59.100 provides, in part: "If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues."

WEA's calculations of nonchargeable expenditures. The packet also provides financial information about WEA and its activities. During the years 1996 to 2000, WEA had approximately 3,500 nonmembers per year, which is approximately 5 percent of the total number of persons represented by WEA.

¶7 When a nonmember challenges WEA's calculation of nonchargeable expenditures, an arbitrator determines the amount of the nonmember's fees that should be rebated. Pending the outcome of the arbitration, WEA escrows any fees that are reasonably [355] in dispute. The WEA rebates to the employee the amount determined by the arbitrator, and transfers the remainder to the WEA general account. During the years 1996 to 2000, the rebates ranged from $44 to $76. Clerk's Papers (CP) at 839. Nonmembers who did not object and did not request rebates did not receive rebates. Their fees were transferred from escrow to WEA's general account. Political expenditures were made from this account pursuant to a 1996 agreement with the PDC. At issue are the fees paid by the nonobjecting nonmembers.

PROCEDURAL BACKGROUND

¶ 8 This is the latest in a series of actions by Evergreen against WEA. These cases include *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n,* 140 Wash.2d 615, 999 P.2d 602 (2000) and *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n,* 111 Wash.App. 586, 49 P.3d 894 (2002).

¶9 The current action began in August 2000, when Evergreen filed a complaint with the PDC, alleging that WEA had violated RCW 42.17.760. The complaint asserted that WEA

failed to get the affirmative authorization of all nonmembers before using the nonmembers' fees for political purposes, as required by the statute. In order to avoid yet another lawsuit, WEA entered into a stipulation with the PDC. In that stipulation, WEA acknowledged that it had violated § 760 during the 1999-2000 fiscal year. The PDC referred the case to the attorney general for prosecution.

¶ 10 The State filed suit against WEA in October 2000, alleging WEA had violated § 760 during the previous five years, 1996 to 2000. Both parties moved for summary judgment. The trial court granted the PDC's motion for partial summary judgment, ruling § 760 is constitutional and it "requires affirmative authorization from agency fee payers ... and defendant's *Hudson* procedures do not satisfy this requirement." CP at 349-50. The court ruled that it was a question of fact whether WEA had "used" those agency fees for political purposes. The case proceeded to a bench trial on the issue of whether the WEA had "used" for political purposes the fees of nonmembers who had failed to object by completing and returning the form contained in the *Hudson* packet.

¶ 11 At trial, three experts testified concerning WEA's accounting procedures and whether WEA had used the fees of the nonobjecting nonmembers. Two of the three experts, including the parties' jointly retained expert, testified that WEA had not used the fees of the nonobjecting nonmembers for political expenditures.

¶ 12 However, the trial court concluded that WEA had used those fees. The court assessed a sanction of $200,000, calculated by multiplying $25 by the approximately 4,000 nonmembers who had failed to respond to the *Hudson* packet. The

court then doubled the fine to $400,000, as allowed by RCW 42.17.400(5). The court awarded the PDC costs and fees of $190,375 for a total judgment against WEA of $590,375. The trial court also issued a permanent injunction, precluding WEA from collecting the full amount of agency fees mandated by RCW 41.59.100 and requiring WEA to institute new procedures for segregating the amounts collected from members and the amounts collected from nonmembers.

¶ 13 WEA appealed. On appeal, Division Two of the Court of Appeals held § 760 unconstitutional because its "affirmative authorization requirement unduly burdens unions." *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n,* 117 Wash.App. 625, 640, 71 P.3d 244 (2003). The State sought review in this court.

¶ 14 The other consolidated case arose in March 2001, when several educational employees, Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcott (Davenport), who are not members of the union, filed a class action against WEA on behalf of present or former public school employees. Davenport claims a private right of action under the Public Disclosure Act (PDA). Davenport seeks a refund of that portion of agency shop fees used for political expenditures. Davenport also alleges tort claims for breach of fiduciary duty, conversion, and fraudulent concealment. The trial court dismissed the breach of fiduciary duty claim but denied dismissal of the other **[356]**claims. In addition, the trial court ruled that § 760 provides a private right of action. The trial court then stayed further proceedings while the parties sought interlocutory appeal. The Court of Appeals granted review. After holding § 760 unconstitutional in the consolidated case, the Court of Appeals remanded the Davenport case

to the trial court for dismissal. Davenport petitioned for review in this court.

¶ 15 This court granted the State's and Davenport's petitions for review and consolidated the two cases. We affirm the Court of Appeals.

ISSUES

1. Does WEA's *Hudson* process satisfy RCW 42.17.760's requirement of affirmative authorization?

2. Does the requirement of affirmative authorization render RCW 42.17.760 unconstitutional?

3. Does chapter 42.17 RCW create a private right of action?

ANALYSIS

1. Does WEA's *Hudson* process satisfy RCW 42.17.760's requirement of affirmative authorization?

¶ 16 Enacted in 1992 as part of Initiative 134 (I-134), the Fair Campaign Practices Act, § 760 restricts the ability of unions to use for political purposes the agency fees paid by employees who have not joined the union. Laws of 1993, ch. 2, §§ 1-36. RCW 42.17.760 provides:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

WEA argues that the *Hudson* process satisfies the requirement of affirmative authorization because it provides each individual nonmember the opportunity to object, to obtain a refund, and to prevent fees from being used by WEA, even temporarily, for political purposes. The State contends that the plain language of the statute makes clear that each individual nonmember must provide actual consent and that failure to respond to the *Hudson* packet does not constitute consent.

¶ 17 Prior to this suit, no court had construed the affirmative authorization requirement of § 760. The PDC, the agency charged with implementing the PDA, had not issued any regulations interpreting § 760 or brought any enforcement actions concerning § 760. In addition, despite several requests that the PDC provide guidance to labor organizations on how to comply with § 760's affirmative authorization requirement, the PDC had not given any direction.

¶ 18 In interpreting an initiative, the court looks at the voters intent and the language of the initiative as the average informed lay voter would interpret it. *In re Estate of Hitchman,* 100 Wash.2d 464, 467, 670 P.2d 655 (1983). Words are given their ordinary meaning. *Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.,* 133 Wash.2d 894, 905, 949 P.2d 1291 (1997). If the language used is fairly susceptible to more than one interpretation, the statute is ambiguous. *Sacred Heart Med. Ctr. v. Dep't of Revenue,* 88 Wash.App. 632, 636, 946 P.2d 409 (1997). If the statute is ambiguous, the intent of the electorate may be ascertained from the language of the initiative as well as the official voters pamphlet. *State v. Thorne,* 129 Wash.2d 736, 763, 921 P.2d 514 (1996).

¶ 19 Because § 760 does not define "affirmative authorization," it is unclear whether the *Hudson* process satisfies the authorization requirement. The plain language seems to indicate a nonmember must provide an expression of positive authorization. Failure to respond to the *Hudson* packet may be considered acquiescence, but it would not fulfill the affirmative authorization requirement. The difference is that affirmative authorization seems to indicate that the member must say "yes," instead of failing to say "no."

¶ 20 In this case, the language of the voters pamphlet does not assist us because it also fails to clarify the term "affirmative authorization" and fails to identify what type of authorization was intended. Indeed, the voters pamphlet describes the requirement **[357]**as "individual authorization," not "affirmative authorization."

¶ 21 The State admits that § 760 does not require written authorization. We agree, otherwise the statute would have so stated. Where written authorization is required in the chapter, the statute specifies written authorization. Compare the language of § 760, which forbids the use of nonmember fees in support of political activities "unless affirmatively authorized by the individual," to the language of RCW 42.17.680(3), which forbids deducting "a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon *written* request of the employee." RCW 42.17.680(3)(emphasis added). Where different language is used in different places within a statute, it is presumed there is a difference in intent. *State v. Roberts*, 117 Wash. 2d 576, 586, 817 P.2d 855 (1991). Therefore, not only does § 760 not

require written authorization, we presume that written authorization is not what is intended.

¶ 22 At oral argument, the State was unable to specify what form of authorization would satisfy the requirement of affirmative authorization, except to say that the *Hudson* process was not sufficient. The State asserts that the voters intended to provide to nonmembers more protection of First Amendment rights than is provided under the *Hudson* process approved by the Supreme Court. However, the State has failed to provide any evidence of such intent. The single line in the voters pamphlet concerning the agency shop fees provision does not mention either the constitution or the protection of the nonmember. The voters pamphlet's only reference to the current § 760 is the comment that under I-134, "agency shop fees could not be used for political purposes without individual authorization." This bare description does not indicate what form the authorization should take or whether the *Hudson* process satisfies the requirement of affirmative authorization.

¶ 23 We have previously discussed the intent of the voters in passing I-134. For example, we declared that "[t]he intent of the people of this State in enacting Initiative 134 can be determined from the declarations in RCW 42.17.610 and .620." *Evergreen Freedom Found. v. Wash. Educ. Ass'n,* 140 Wash.2d at 637, 999 P.2d 602. Those declarations of intent indicate that the principal thrust of I-134 was to protect the integrity of the election process from the perception that elected officials are improperly influenced by monetary contributions and the perception that individuals have an insignificant role to play. *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n,* 141 Wash.2d 245, 293,

4 P.3d 808 (2000) (Talmadge, J., dissenting). Thus, the intent of the statute is to protect the public, not individual employees. *Crisman v. Pierce County Fire Prot. Dist. No. 21,* 115 Wash.App. 16, 23, 60 P.3d 652 (2002). The requirement of individual authorization does not advance this intent any more than the *Hudson* process.

¶ 24 Where a statute is ambiguous and this court is able to construe it in a manner which renders it constitutional, the court is obliged to do so. *State v. Dixon,* 78 Wash.2d 796, 804, 479 P.2d 931 (1971). However, having construed the statute as requiring more than a nonresponse to a *Hudson* packet, we must next examine the constitutionality of § 760.

2. Does the requirement of affirmative authorization render RCW 42.17.760 unconstitutional?

¶ 25 A party challenging the constitutionality of a statute bears the burden of establishing its unconstitutionality beyond a reasonable doubt. *State ex rel. Heavey v. Murphy,* 138 Wash.2d 800, 808, 982 P.2d 611 (1999). A statute is presumed constitutional, and all doubts are resolved in favor of constitutionality. *Dixon,* 78 Wash.2d at 804, 479 P.2d 931.

¶ 26 The first and fourteenth amendments to the United States Constitution protect the freedom of an individual to associate for the purpose of advancing beliefs and ideas. *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 233, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Elrod v. Burns,* 427 U.S. 347, 355-57, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). The practice of persons banding together to make their political voices heard is deeply embedded **[358]**in the American political process. *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 294,

102 S.Ct. 434, 70 L.Ed.2d 492 (1981). "Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Id.*

¶ 27 The freedom to associate encompasses the freedom to contribute financially to an organization for the purpose of spreading a political message. *Id.* at 296, 102 S.Ct. 434. "Making a contribution ... enables like-minded persons to pool their resources in furtherance of common political goals." *Buckley v. Valeo,* 424 U.S. 1, 22, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Restrictions on expenditures in political campaigning "implicate fundamental First Amendment interests." *Id.* at 23, 96 S.Ct. 612; *see also Wash. State Republican Party,* 141 Wash.2d at 256, 4 P.3d 808.

¶ 28 On the other hand, equally protected is a person's right not to be compelled to support political and ideological causes with which he or she disagrees. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group,* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). The freedom of association includes the converse right not to be compelled to associate. *Good v. Associated Students of Univ. of Wash.,* 86 Wash.2d 94, 100, 542 P.2d 762 (1975). Freedom of speech includes the freedom not to speak or to have one's money used to advocate ideas one opposes. *Keller v. State Bar of Calif.,* 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood,* 431 U.S. at 234-35, 97 S.Ct. 1782.

¶ 29 In a series of cases, the United States Supreme Court has addressed these competing rights–the right to freely associate for the purpose of political speech and the right to be free from forced association--in the context of the political speech of labor organizations. The result is an approach which strikes a balance between those who disagree with the labor organization's political activities and those who support the political activities. The approach accommodates the dissenting nonmember by providing an easy and prompt method of registering his or her objection and recouping any portion of fees which might otherwise be used by the union for political purposes. At the same time, the approach crafted by the Court makes it simple for one who supports the political causes of the union, whether member or nonmember, to assert his or her right of association.

¶ 30 In *International Association of Machinists v. Street,* 367 U.S. 740, 749, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Court considered whether a union "receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes." The Court recognized the government's interest in supporting the important role unions play in preserving workplace harmony. Compulsory dues or fees to the union were justified by the union's obligation to represent all employees, whether members or not, as well as the union's desire to avoid free-riders. Therefore, the Court affirmed the union's right to collect fees from all employees who benefit from the union's collective bargaining activities.

¶ 31 The Court held, however, that compulsory union dues may not be used to support political causes if the member disagrees with those causes. On the other hand, "the majority

also has an interest in stating its views without being silenced by the dissenters." *Id.* at 773, 81 S.Ct. 1784.

¶ 32 The Court stated that the appropriate remedy must reconcile the majority and dissenting interests in the area of political expression, protecting both interests "to the maximum extent possible without undue impingement of one on the other," and taking into account the administrative difficulty of accommodating each group. *Id.* Any remedies, however, would properly be granted only to those employees who had made known to the union that they did not desire their funds to be used for political causes to which they object. "[D]issent is not to be presumed--it must affirmatively be made **[359]**known to the union by the dissenting employee." *Id.* at 774, 81 S.Ct. 1784.

¶ 33 In *Abood,* the Court affirmed that the principles of *Street* applied to public employees represented by a collective bargaining agency. The Court held that the union was allowed to use members' dues for purposes other than collective bargaining, provided the money did not come from employees who objected to the causes supported. *Abood,* 431 U.S. at 222, 97 S.Ct. 1782. "[T]he Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-36, 97 S.Ct. 1782. The Court affirmed that the burden is on the employee to make his objection known.

¶ 34 Then in *Hudson* and *Ellis*,[3] while once again affirming that the burden is on the employee to register his dissent to the union's political activities, the Court outlined the procedures that are constitutionally required to safeguard the First Amendment rights of that dissenting employee. An employee who is given a simple and convenient method of registering dissent has not been compelled to support a political cause and has not suffered a violation of his or her First Amendment rights.[4]

¶ 35 With these principles in mind, we consider the constitutionality of the restriction imposed by § 760 on the political speech of the union, its members, and its nonmembers. Regulation of First Amendment rights is always subject to exacting judicial scrutiny. *Citizens Against Rent Control,* 454 U.S. at 294, 102 S.Ct. 434. The State bears the burden of demonstrating that the restriction is narrowly tailored to achieve a compelling governmental interest. *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.,* 135 Wash.2d 618, 624, 957 P.2d 691 (1998). "Such burdens are rarely met." *Id.*

¶ 36 Under § 760, the union is prevented from spending any portion of a nonmember's agency fees for political causes

---

[3] *Ellis v. Bhd. of Ry., Airline & S.S. Clerks,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984).

[4] Neither party has provided an analysis or argument to show why, in this context, the state constitutional provision protecting the rights of free speech and association should be construed more broadly than the federal provision. Therefore, we interpret the state constitutional clause coextensively with its parallel federal counterpart. *Nelson v. McClatchy Newspapers, Inc.,* 131 Wash.2d 523, 538, 936 P.2d 1123 (1997).

without the affirmative authorization of the nonmember. The WEA contends, and a majority at the Court of Appeals agreed, that the statute is unconstitutional because its requirement of affirmative authorization amounts to an impermissible presumption that each nonmember objects to the union's use of his or her fees for political activities. The State argues that although the Supreme Court has placed the burden on the dissenting nonmember to *assert* his or her First Amendment rights, it is nevertheless constitutionally permissible for § 760 to shift the burden to the union to *protect* the First Amendment rights of dissenting nonmembers. The Court of Appeals held that by presuming the dissent of nonmembers, § 760 upsets the balance of members' and nonmembers' constitutional rights in the context of a union's expenditures for political activities. Section 760 impermissibly shifts to the union the burden of the nonmembers' rights. This has the practical effect of inhibiting one group's political speech (the union and supporting nonmembers) for the improper purpose of increasing the speech of another group (the dissenting nonmembers).

¶ 37 A presumption of dissent violates the First Amendment rights of both members and nonmembers. The State argues that § 760 has no impact on the First Amendment rights of members because § 760 only requires the affirmative authorization of nonmembers. However, this argument denies the obvious, significant expense involved in complying with § 760. It is disingenuous to argue that § 760 has no impact on members' ability to assert their collective political voice. Campaign finance legislation can create insurmountable organizational and financial hurdles for organizations attempting to engage in political speech, rendering the legislation unconstitutional. *Fed. Election* **[360]***Comm'n v.*

Mass. Citizens for Life, Inc., 479 U.S. 238, 254-55, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). The weight of the administrative burden on the union is an important consideration in resolving the balance of member and nonmember First Amendment rights. *See, e.g., Waters v. Churchill,* 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (court should consider the cost of procedural safeguards on First Amendment rights); *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir.1993) (requirements of accommodating dissenting nonmembers must be practical). Dissenters may not silence the majority by the creation of too heavy an administrative burden.

¶ 38 In this case, WEA presented evidence that the procedures required by the State's interpretation of § 760 would be extremely costly and would have a significant impact on the union's political activities. *See* Report of Proceedings (RP) at 175-76, 187, 203, 208. The State concedes that written permission is not required. But even without a written permission requirement, the State's position would require individual contact with each nonmember who did not respond to the *Hudson* packet. Therefore, we reject the State's argument that transferring the burden from the dissenting nonmember to the union would have no impact on the union's ability to assert its political voice.

¶ 39 A presumption of dissent violates the First Amendment rights of nonmembers as well. A presumption of dissent fails to respect the nonmember's First Amendment rights as "running both ways." *Wagner v. Prof'l Eng'rs in Calif. Gov't,* 354 F.3d 1036, 1043 (9th Cir.2004). It assumes that because an employee has not joined the union, he or she disagrees with the union's political expenditures. However, there are

numerous and varied reasons why employees choose not to join a union. *Leer v. Wash. Educ. Ass'n,* 172 F.R.D. 439, 446-47 (W.D.Wash.1997) (nonmembers do not have unanimity of purpose). Employees may choose to remain nonmembers for many reasons unrelated to political expression. For those nonmembers who agree with the union's political expenditures, § 760's presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues. We are bound to provide at least as much protection to the union's members and nonmembers as that provided by the First Amendment: " '[S]tates have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress." ' *Wash. State Republican Party,* 141 Wash.2d at 264, 4 P.3d 808 (quoting *Wallace v. Jaffree,* 472 U.S. 38, 48-49, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985)).

¶ 40 Nevertheless, the State argues that we need not adhere to the balance of First Amendment rights as articulated in *Street, Abood,* and their progeny.[5] The State argues that those cases are different because they do not involve a state statute that expressly calls for affirmative authorization of nonmembers. The State also places great emphasis on the fact that § 760 was enacted by the citizens of Washington. However, the voters

---

[5] Similarly, the dissent asserts that balancing members' and nonmembers' rights is a "false" requirement created by the majority, rather than an approach created by the Supreme Court. On the contrary, as other courts have recognized, "the balance of interests underlying all of the Supreme Court's pronouncements on the subject of agency shop fees" must be applied when determining the use of those fees for political purposes. *Weaver,* 970 F.2d at 1533; *see e.g., Miller,* 103 F.3d at 1253 (union's process must strike "a balance between the right to solicit political contributions and the co-equal right not to contribute").

cannot do through initiative what is constitutionally prohibited. *Amalgamated Transit Union Local 587 v. State,* 142 Wash.2d 183, 204, 11 P.3d 762 (2000). In reviewing the constitutionality of a statute, it is irrelevant that a statute is enacted by the voters rather than a legislative body. *Id.*

¶ 41 Moreover, while our state may provide greater protection to its citizens, such as dissenting nonmembers, than is provided by the federal constitution, it cannot do so at the expense of the rights of other citizens, such as members and supporting nonmembers. The State's argument transfers the burden of asserting First Amendment rights from the dissenting nonmembers and places it on the supporting nonmembers and the union. Increased protection for nonmembers, as asserted by the State, tips the scales of First **[361]** Amendment rights in favor of the dissenting nonmember, while increasing the burden on the nonmember who supports the union's political causes and also on the union, which must bear the administrative costs. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley,* 424 U.S. at 48-49, 96 S.Ct. 612.

¶ 42 In addition, there is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles. Rather, as we have previously stated, the principal thrust of I-134 was to protect the integrity of the election process from the perception that elected officials are improperly influenced by monetary contributions and the perception that individuals have an insignificant role to play.

*Wash. State Republican Party*141 Wash.2d at 293, 4 P.3d 808.

The intent of the statute was to protect the public, not individual employees. *Crisman,* 115 Wash.App. at 23, 60 P.3d 652 (the wording and history of chapter 42.17 RCW indicate that its goal is to protect the public); *see also Nelson,* 131 Wash.2d at 532, 936 P.2d 1123 ("Initiative 134 ... was aimed at repairing the political process.").

¶ 43 The Ninth Circuit engaged in a similar analysis in *Mitchell v. Los Angeles Unified School District,* 963 F.2d 258 (9th Cir.), *cert. denied,* 506 U.S. 940, 113 S.Ct. 375, 121 L.Ed.2d 287 (1992). In *Mitchell,* plaintiffs were nonmembers who, like the nonmembers here, failed to object to the union's use of a portion of agency shop fees for nonchargeable expenditures. The district court issued an injunction, requiring the union to obtain the affirmative consent of each individual nonmember before using that nonmember's fees for political purposes.

¶ 44 The Ninth Circuit reversed, holding that requiring an opt-in system "would unduly impede the union in order to protect 'the relatively rare species' of employee who is unwilling to respond to the union's notifications but nevertheless has serious disagreements with the union's support of its political and ideological causes." *Id.* at 263. The court held it would be an unconstitutional burden to require all those who agree with the union's political activities to affirmatively consent. *Id.* The *Mitchell* court quoted the United States Supreme Court's statement in *Street,* that the union should not be sanctioned in favor of an employee who makes no complaint regarding the use of his or her money. *Id.* at 260. In addition, the court quoted from a California Supreme Court decision that reached the same conclusion in a similar case:

"[E]ach nonmember has a right to prevent the use of his or her service fee for purposes beyond the union's representational obligations. Since ... that additional right is an aspect of the right of an employee to refuse to participate in a union's activities ..., it must be affirmatively asserted or else it is waived." *Id.* at 262 (quoting *Cumero v. Pub. Employment Relations Bd.*, 49 Cal.3d 575, 590, 262 Cal.Rptr. 46, 778 P.2d 174 (1989)).

¶ 45 Likewise, the Sixth Circuit held that the Supreme Court has set out a "hierarchy of interests," which places the burden on the nonmember to make his objection known. *Weaver v. Univ. of Cin-cinnati*, 970 F.2d 1523, 1532 (6th Cir.1992), *cert. denied*, 507 U.S. 917, 113 S.Ct. 1274, 122 L.Ed.2d 668 (1993). The *Weaver* court stated that "[a]n 'opt-in' procedure would greatly burden unions while offering only a modicum of control to nonunion employees whose procedural rights have already been safeguarded by *Hudson*." *Id.* at 1533. An opt-in provision impermissibly shifts the balance of interests underlying all of the Supreme Court's pronouncements. *Id.*

¶ 46 The dissent incorrectly states that the Sixth Circuit has explicitly affirmed the constitutionality of an opt-in statute similar to § 760. Dissent at 8 (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir.1997)). However, the statute at issue in *Miller* is not similar to § 760. Washington's counterpart to the Michigan statute at issue in *Miller* is RCW 42.17.680(3), which we construed in one of Evergreen's previous suits against WEA. *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wash.2d 615, 999 P.2d 602 (2000). The provision at issue in *Miller* was the Michigan statute's prohibition of reverse checkoff, a **[362]** collection system that automatically deducts

contributions from a member's paycheck without his or her prior approval. Like the Michigan statute at issue in *Miller*, RCW 42.17.680(3) restricts the ability of various groups, including corporations and labor groups, from making direct deductions from an employee's wages. *Miller* did not involve a statute like § 760, and *Miller* is inapplicable to this case.[6]

¶ 47 The United States Supreme Court has held that a union has the right to use nondissenting nonmember fees for political purposes. *Abood*, 431 U.S. at 240, 97 S.Ct. 1782 (quoting *Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 122, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963)). The State has failed to even attempt to justify § 760, which it is required to do when regulating First Amendment rights. In fact, a restriction on the First Amendment rights of WEA must be justified by a *compelling* governmental interest. Here, the only interest asserted is additional protection for nonmembers' First Amendment rights. However, there is no indication or

---

[6] The dissent sees no distinction between *Miller* and the current case: However, use of agency shop fees was not at issue in *Miller* and Michigan does not have a statute that specifically applies only to agency shop fees. Furthermore, we note that the primary issue in *Miller* concerned applying to unions the statutory restrictions against reverse checkoff, which were already applied to corporations, nonprofits, and other groups. The *Miller* court held that the Michigan statute "applies evenhandedly" to unions, corporations, and other entities. *Miller*, 102 F.3d at 1251. The parties have not raised, and we do not address, any argument concerning § 760's application solely to labor organizations while nonprofit, corporate, and other groups are not similarly subject to affirmative authorization requirements. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) (statute that restricts corporate political expenditures, but not labor organization's political expenditures, was justified, in part, by ability of fee payer to avoid paying for political activities of a labor organization whereas shareholders cannot dissociate themselves from corporation's political activities).

argument that WEA is compelling nonmembers to support political activities or preventing nonmembers from asserting their First Amendment rights.

¶ 48 The Supreme Court has indicated that a nonmember has a right to be free from compelled support of a political cause the nonmember does not agree with. As the Supreme Court has held, there is no compelled support if the union utilizes the *Hudson* procedures. Given that there is no compelled support, it does not appear that there is any governmental interference with First Amendment rights of nonmembers for § 760 to protect against. Certainly the State has not provided any evidence of a compelling governmental interest that justifies the restriction on WEA from using the fees of the nondissenting nonmembers.

¶ 49 Judge Robin J. Hunt in her dissent at the Court of Appeals opines that while "opt-in" procedures have not been found to be constitutionally required, the procedure is not constitutionally infirm. *State ex rel. Pub. Disclosure Comm'n v. Wash. Educ. Ass'n,* 117 Wash.App. 625, 644, 71 P.3d 244 (2003) (Hunt, J., concurring in part, dissenting in part). She argues that the cases we cite, *Street, Abood, Mitchell,* and others, create a constitutional floor, but not a ceiling. Even if this argument were accepted, when the State acts in a way that affects the associational and free-speech rights of individuals, in addition to having a compelling reason, its legislation must be narrowly tailored. RCW 42.17.760 is not narrowly tailored especially when examined in light of recent United State [sic] Supreme Court authority.

¶ 50 In *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000), the United States Supreme

Court set forth the test for determining whether a government regulation improperly violates a group's right of expressive association. Because § 760 regulates the relationship between the union and agency fee payers with regard to political activity, the *Boy Scouts* analysis should be applied here. Under the *Boy Scouts* test, we must evaluate whether § 760's opt-in provision would significantly burden the union's expressive activity. *Boy Scouts,* 530 U.S. at 653, 120 S.Ct. 2446. If so, then we must analyze whether § 760's opt-in provision is narrowly tailored to support a compelling state interest that is unrelated to the suppression of free speech. *Id.* at 648. We conclude that the union's expressive activity is significantly **[363]**burdened by § 760's opt-in requirement. We also conclude that any compelling state interest in protecting dissenters' rights, could be met by less restrictive means other than the § 760 opt-in procedure. The union's *Hudson* procedures amount to a constitutionally permissible alternative that adequately protects both the union and dissenters. Because RCW 42.17.760 is not narrowly tailored, we hold that the statute is unconstitutional.

¶ 51 The dissent complains that the narrowly tailored issue was not argued or briefed and that we should not rely on *Boy Scouts.* However, this is specifically argued in Respondent WEA's brief to this court. Resp't Br. at 14. That the *Boy Scouts v. Dale* case was not cited does not preclude this court from considering this important case. "[T]his court has the inherent discretionary authority to reach issues not briefed by the parties if those issues are necessary for decision." *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers,* 151 Wash.2d 203, 213, 87 P.3d 757 (2004) (quoting *City of Seattle v. McCready,* 123 Wash.2d 260, 269, 868 P.2d 134 (1994)). Moreover, "[T]his court has frequently recognized it is not

constrained by the issues as framed by the parties if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent." *City of Seattle v. McCready,* 123 Wash.2d 260, 269, 868 P.2d 134 (1994).

¶ 52 In 2000, the United States Supreme Court analyzed whether application of New Jersey's public accommodation law to require the Boy Scouts to admit James Dale, a homosexual gay rights activist, violated the Boy Scouts' First Amendment right of expressive association. *Boy Scouts,* 530 U.S. at 643, 647, 120 S.Ct. 2446. The Court noted that government actions that unconstitutionally burden a group's right of expressive association "may take many forms," one of which was forcing a group to accept certain unwanted members. *Id.* at 648, 120 S.Ct. 2446. The Court then applied a multistep analysis and concluded (1) that the Boy Scouts engaged in expressive activity, (2) that forced inclusion of Dale would significantly burden the Boy Scouts' expression, and (3) that application of New Jersey's public accommodations law in that case ran afoul of the Boy Scouts' constitutional freedom of expressive association. *Id.* at 656, 120 S.Ct. 2446.

¶ 53 While this case involves regulation of the use of agency shop fees, rather than regulation of the group's membership, the essence of RCW 42.17.760 is state regulation of the relationship between the union and agency fee payers with regard to political speech.

¶ 54 Under *Boy Scouts,* in order to determine whether § 760 violates the union's freedom of expressive association, we must first determine whether the union engages in expressive activity. *Boy Scouts,* 530 U.S. at 656, 120 S.Ct. 2446. It is

clear from the record that the WEA engages in political and ideological activities not related to collective bargaining or contract administration. Moreover, § 760 specifically regulates the expenditure of agency shop fees "to influence an election or to operate a political committee." Thus, it seems indisputable that the union engages in expressive activity and § 760 regulates the union's expressive association with agency fee payers. *See Boy Scouts,* 530 U.S. at 650, 120 S.Ct. 2446.

¶ 55 We must next determine whether § 760 opt-in requirement, significantly burdens the union's ability to express its viewpoint. The *Boy Scouts* Court emphasized that courts "must also give deference to an association's view of what would impair its expression." *Boy Scouts,* 530 U.S. at 653, 120 S.Ct. 2446.

¶ 56 RCW 41.59.060(2) provides that if an agency shop agreement becomes effective, a fee that is equivalent to union dues will be deducted from the salary of employees in the bargaining unit. *See also* RCW 41.59.100 (providing for limited exceptions not at issue here). Thus, under the agency shop provisions, the union is entitled to collect a fee equivalent to 100 percent of union dues from nonmembers in the bargaining unit. RCW 41.59.100.

¶ 57 RCW 42.17.760 then encumbers the use of such funds by prohibiting their expenditure for political speech absent affirmative authorization by the agency fee paying nonmember. Notably, the statute acknowledges **[364]**that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech. RCW 42.17.760.

¶58 The union's *Hudson* procedures protect dissenters' rights not to participate in the union's political speech. Twice a year, the union mailed a *Hudson* packet to agency fee payers. The packet contained detailed information about the union's expenditures and the right to object to nonchargeable expenditures. The packet offered three options. A nonmember could: (1) pay agency shop fees equal to 100 percent of union dues, (2) pay agency shop fees, but object to WEA's political expenditures and receive a rebate of nonchargeable expenditures as calculated by the union, or (3) object to the WEA's political expenditures and challenge the WEA's calculation of nonchargeable expenditures before an impartial arbitrator. RCW 42.17.760 significantly changes this process by requiring the union to forgo the use of the portion of agency fees that would go toward political expenditures *unless* the nonmember affirmatively authorizes use for political purposes, rather than allowing the union to use that portion of the agency fee for political speech absent objection.

¶ 59 The union contends that § 760's affirmative authorization requirement significantly burdens its expressive association with nonobjecting agency fee payers. At trial, a union expert testified that it would double the complexity of the dues collection system if fee payers were to pay a different amount than members. The union's additional efforts to attain affirmative authorization would impose further administrative burden. Even if the union were to hold the amount allocated to political activity in escrow while seeking affirmative authorization, the lack of access to those funds could impact the timeliness of the union's political speech. Given the *Boy Scouts* requirement that we give deference to the union's view of what would impair its political expression and given the long recognized, highly protected nature of political speech,

we conclude that RCW 42.17.760 significantly burdens the union's right of expressive association. *See Boy Scouts,* 530 U.S. at 653, 120 S.Ct. 2446; *see also Meyer v. Grant,* 486 U.S. 414, 425, 108 S.Ct. 1886, 100 L.Ed. 2d 425 (1988) (political speech is at the core of the First Amendment freedom).

¶ 60 Finally, we must consider whether RCW 42.17.760 is narrowly tailored to support a compelling government interest that is unrelated to suppression. *Boy Scouts,* 530 U.S. at 648. The protection of dissenters' First Amendment rights is a compelling interest and this interest is not rooted in a desire to suppress the union's political speech for suppression's sake. However, the federal case law previously extensively cited reveals that § 760's opt-in provision is not narrowly tailored to protect this interest. *Hudson,* 475 U.S. 292, 106 S.Ct. 1066; *Abood,* 431 U.S. 209, 97 S.Ct. 1782; *Street,* 367 U.S. 740, 81 S.Ct. 1784; *Weaver,* 970 F.2d 1523; *Mitchell,* 963 F.2d 258. As noted previously, the United States Supreme Court and other federal courts have concluded that a constitutionally acceptable alternative is the opt-out system previously implemented by the union. *See, e.g., Street,* 367 U.S. at 774, 81 S.Ct. 1784; *Abood,* 431 U.S. at 235-36, 97 S.Ct. 1782; *Mitchell,* 963 F.2d at 262-63. Even if these cases do not contain a constitutionally based prohibition *against* opt-in systems, they do reveal a less restrictive alternative means for protecting dissenters' rights. Under the *Boy Scouts* analysis, § 760 significantly burdens the union's expressive association, requiring the statute to survive strict scrutiny. *See Boy Scouts,* 530 U.S. at 648, 120 S.Ct. 2446. The constitutionally acceptable opt-out alternative is significant in that it reveals that protection of dissenters' rights can be achieved through means significantly less restrictive of the union's associational freedoms than RCW 42.17.760's opt-in requirement. *See id.* In

sum, RCW 42.17.760 regulates the relationship between the union and agency fee payers with regard to political expression. Therefore, we apply the framework set forth in *Boy Scouts* to determine whether § 760 violates the union's right of expressive association. The union engages in expressive activity and RCW 42.17.760's opt-in requirement significantly burdens the union's association with agency fee payers with regard to its political speech. Accepting the **[365]**argument that protection of dissenters' rights is a compelling state interest, the opt-out procedure is a less restrictive constitutionally permissible alternative. RCW 42.17.760's opt-in procedure is not narrowly tailored to advance the State's interest in protecting dissenters' rights, and thus, the statute is unconstitutional.

3. Does chapter 42.17 RCW create a private right of action?

¶ 61 Because Davenport's claims in the consolidated case are founded on an alleged violation of § 760, we do not reach either Davenport's claim that chapter 42.17 RCW implies a private right of action or Davenport's tort claims. We therefore affirm the Court of Appeals' remand of Davenport to the superior court for dismissal.

CONCLUSION

¶ 62 We hold that RCW 42.17.760 is unconstitutional. We affirm the Court of Appeals in each case.

C. JOHNSON, MADSEN, BRIDGE, CHAMBERS and OWENS, J.J., concur.

SANDERS, J. (dissenting).

> That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.[1]

¶ 63 The majority turns the First Amendment on its head. Unions have a statutory, not constitutional, right to cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount.[2] Absent this statutory mechanism for the withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223, 97 S.Ct. 1782, 1793, 52 L.Ed.2d 261 (1977).

---

[1] Thomas Jefferson, *Religious Liberty Guaranteed: Bill for Establishing Religious Freedom, 1779, in* A DOCUMENTARY HISTORY *OF* RELIGION *IN* AMERICA 231 (Edwin S. Gaustad ed., 3d ed.2003) (emphasis omitted).

[2] RCW 41.59.060(2) ("If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100, except as provided in that section, the agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit."); RCW 41.59.100 ("A collective bargaining agreement may include union security provisions including an agency shop .... If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues....").

¶ 64 Many other states have markedly different statutory schemes: Some entirely bar union security agreements and outlaw agency shops as well.[3]

¶ 65 Should the legislature of the State of Washington choose to repeal the mandatory withholding provisions of RCW 41.59.060 and .100, there would be no constitutional impediment to doing so. And no party to this proceeding claims there is.

¶ 66 However the existence of these mandatory withholding statutes does raise a very definite constitutional problem insofar as the statute is used to compel the *nonmember* to support the political advocacy of the union **[366]**without his consent. Nearly every case cited by the majority concerns precisely that eventuality. However that constitutional

---

[3] *See* Ala.Code §§ 25-7-6, 25-7-30 to 25-7-36 (Supp.1992); Ariz.Rev.Stat. Ann. Const. art. XXV (West 1984) and §§ 23-1301 to 23-1303 (West 1995); Ark.Code Ann. §§ 11-3-301 to 11-3-304 (Michie Supp.1996); Fla. Stat. Ann. Const. art. 1, § 6 (West 1991); Ga.Code Ann. §§ 34-6-20 to 34-6-28 (1998); Idaho Code Ann. §§ 44-2001 to 44-2012 (1997); Iowa Code Ann. §§ 731.1 to 731.5 (West 1993); Kan. Stat. Ann. Const. art. 15, § 12 (1988); La.Rev.Stat. Ann. §§ 23:981 to 23:985 (West 1998); Miss.Code Ann. § 71-1-47 (1995); Neb.Rev.Stat. Const. art. XV, § 13 (1995); Nev.Rev.Stat. Ann. §§ 613.230 to 613.300 (Michie 1996); N.C. Gen.Stat. §§ 95-78 to 95- 84 (1997); N.D. Cent.Code §§ 34-01-14, 34-08-04 (1987); S.C.Code Ann. §§ 41-7-10 to 41-7-90 (Law Co-op. 1986); S.D. Codified Laws Const. art. VI, § 2 (Michie 1978) and §§ 60-8-3 to 60-8-8 (Michie 1993); Tenn.Code Ann. §§ 50-1-201 to 50-1-204 (1991); Tex. Lab.Code Ann. §§ 101.051 to 101.053 (West 1996); Utah Code Ann. §§ 34-34-01 to 34-34-17 (1997); Va.Code Ann. §§ 40.1-58 to 40.1-69 (Michie 1994); Wyo. Stat. Ann. §§ 27-7-108 to 27-7-115 (Michie 1997). Thirteen of these states outlaw agency shops as well as union shops. There is no indication that any state has been held to have violated union members' rights by foreclosing mandatory collection of fees from nonmembers.

problem can no longer arise in the state of Washington by virtue of a further statute, RCW 42.17.760, which provides in its entirety:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

¶ 67 There is nothing ambiguous about this statute. No labor organization may use agency fees for political purposes absent "affirmative authoriz[ation]" by the individual. Nonaction or acquiescence is not "affirmative authoriz[ation]."

¶ 68 Given that the legislature could constitutionally repeal the whole statutory scheme allowing withholding in the first place, I find it nearly beyond comprehension to claim that the legislature, or the people acting through their sovereign right of initiative, could not qualify these statutes to ensure their constitutional application.

¶ 69 In short, the majority turns the First Amendment on its head to invalidate a state statute enacted to further protect the constitutional rights of nonunion members who are required to pay agency fees as the price of their employment.

¶ 70 While the First Amendment protects the right to organize and to express ideas on behalf of an organization, it "does not impose any affirmative obligation on the government to listen, to respond, or ... to recognize the association and bargain with it." *Smith v. Ark. State Highway Employees,* 441 U.S. 463, 465, 99 S.Ct. 1826, 1828, 60 L.Ed.2d 360 (1979). *See also Brown v. Alexander,* 718 F.2d 1417, 1421-22 (6th Cir.1983).

Following from this basic premise, there is no constitutional right to have the government deduct union dues (and, by logical extension, agency fees) from paychecks. *Ark. State Highway Employees v. Kell,* 628 F.2d 1099 (8th Cir.1980).

¶ 71 "Although the loss of payroll deductions may economically burden the [union] and thereby impair its effectiveness, such a burden is not constitutionally impermissible." *S.C. Educ. Ass'n v. Campbell,* 883 F.2d 1251, 1256 (4th Cir.1989). "[T]he First Amendment does not impose an affirmative obligation on the state to assist the program of an association by providing payroll deduction services." *Id.* at 1257. The Fourth Circuit, examining whether payroll deductions were constitutionally required, quoted the United States Supreme Court, " '[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right." ' *Id.* at 1256 (quoting *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)). The court concluded by stating, "the state's failure to authorize payroll deductions for the [union] does not deny [union] members the right to associate, to speak, to publish, to recruit members, or to otherwise express and disseminate their views." *Id.* at 1257.

¶ 72 The Ohio legislature eliminated wage checkoffs for the support of any "candidate, separate segregated fund, political action committee, legislative campaign, political party, or ballot issue." Ohio Rev.Code § 3599.031(H). The United States Court of Appeals for the Sixth Circuit found this constitutional. *Toledo Area AFL-CIO Council v. Pizza,* 154 F.3d 307, 319-21 (6th Cir.1998).

¶ 73 Therefore, it would be perfectly constitutional if the State chose to eliminate the payroll deduction for collection of

agency shop fees altogether. How then could merely placing a procedural condition on the collection of a small portion of such shop fees (those that would be used to influence an election or to operate a political committee) violate the constitution?

¶ 74 The majority chooses not to address this line of cases. Instead it distorts cases delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree to do the opposite: limit the State's ability to protect such dissenters.

¶ 75 Simply put, all of the cases cited by the majority involve claims by dissenters that certain steps were required to protect their constitutional right *not* to associate and not to have their money spent supporting political [367]positions with which they dis-agreed.[4] I cannot improve upon Judge Hunt's dissent from the case below: "[T]hese cases do not support the converse, advanced by the majority here, that an 'opt-in' provision such as Washington's is constitutionally barred." *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n,* 117 Wash.App. 625, 642, 71 P.3d 244 (2003)

---

[4] *Mitchell v. Los Angeles Unified School District,* 963 F.2d 258 (9th Cir.1992) is no different. That case concerned the First Amendment *right of nonunion employees* to withhold financial support from union political activity. The court held the constitutional right of the nonunion employees was adequately protected by an opportunity to "opt-out" of full dues payment through an agency fee. The constitutional rights of the union were never at issue.

(Hunt, J., dissenting).[5] Judge Hunt's learned dissent cogently analyzes each of the cases relied upon by the majority and reaches the correct conclusion.[6]

¶ 76 Our majority takes "dissent is not to be presumed"[7] out of the context in which it was written--the context of unions categorically violating the rights of dissenters. That language simply served to limit the actions a union must undertake *in the absence of a sta-tutory scheme.* The holdings of all the cases cited by the majority amount to a simple proposition: the constitution requires *at least* an opt-out scheme to protect

---

[5] *See also* IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 219-20 (9th ed.1994) (converse of a given proposition not necessarily valid).

[6] *See State ex rel. Wash. State Pub. Disclosure Comm'n,* 117 Wash.App. at 642-44, 71 P.3d 244 (Hunt, J., dissenting), analyzing *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Bhd. of Ry. & S.S. Clerks v. Allen,* 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *Abood,* 431 U.S. 209, 97 S.Ct. 1782; *Ellis v. Bhd. of Ry.,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984); *Mitchell,* 963 F.2d 258. While Judge Hunt did not examine *Weaver v. University of Cincinnati,* 970 F.2d 1523 (6th Cir.1992), that case arose in the identical context to the others: a claim that certain procedures, such as affirmative consent, were constitutionally *required* to protect dissenters' rights. *See Weaver,* 970 F.2d at 1531. All of these cases dealt with the constitution a floor--a minimum level of process needed to protect dissenters' rights. None of these cases dealt with the constitution as a ceiling limiting the discretion of legislators, or the people acting as legislators, in providing further protection to dissenters.

[7] *Street,* 367 U.S. at 774, 81 S.Ct. 1784; *Abood,* 431 U.S. at 238, 97 S.Ct. 1782.

dissenters' rights. [8] None of these cases stand for the proposition that the constitution limits a different legislative approach to protecting dissenters' rights, including an opt-in scheme.

¶ 77 From the majority's misconstruction of the "dissent is not to be presumed" language a false "balance" requirement is invented. Other than general paeans to the right of association, the majority cites no other precedent for its holding that the "balance" between the associational rights of dissenters and nondissenters is upset by requiring one to register assent, rather than register dissent.[9] Again, if the elimination **[368]**of

---

[8] Even the language quoted by Justice Ireland demonstrates this: " '[T]he Constitution *requires* only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object." ' Majority at 17 (quoting *Abood,* 431 U.S. at 235-36, 97 S.Ct. 1782) (emphasis added). Further, *Abood* was a plurality opinion, and the concurring justices either explicitly chose not to address alternative remedies for the violations of dissenters' rights, remedies such as RCW 42.17.760 (*see Abood,* 431 U.S. at 244, 97 S.Ct. 1782 (Stevens, J., concurring)), or explicitly stated that the constitution does not *require* employees to "declare their opposition to the union and initiate a proceeding" in order to vindicate their First Amendment rights. *Abood,* 431 U.S. at 245, 97 S.Ct. 1782 (Powell, J., concurring).

[9] And even the cases cited as interpreting the "presumption of dissent" are misrepresented. *Wagner v. Professional Engineers in California Government,* 354 F.3d 1036, 1043 (9th Cir.2004) is cited for the proposition that "[a] presumption of dissent fails to respect the nonmember's First Amendment rights as 'running both ways." ' Majority at 21 (quoting *Wagner,* 354 F.3d at 1043). Yet the issue discussed in that section of *Wagner* was whether the proper remedy for an inadequate *Hudson* notice (where no statutory scheme required assent prior to use) was return of the nonchargeable amounts to all fee payers, including those who did not object, or whether the proper remedy was a new, proper notice with a renewed opportunity to object and then to receive a refund with interest.

(continued...)

a payroll deduction does not abridge the constitutional rights of union members and nonobjecting nonmembers to associate, it is inconceivable that requiring assent as a precondition to using funds generated by a payroll deduction abridges such rights.

¶ 78 In fact, an "opt-in" legislative scheme has explicitly been constitutionally upheld. In *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir.1997), the Sixth Circuit upheld a statute that read:

> "[A] labor organization may solicit or obtain contributions for a separate segregated fund ... on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund *affirmatively consents to the contribution* at least once in every calendar year."

Id. at 1248-1249 (quoting Mich. Comp. Laws Ann. § 169.255(6) (West 1966)).

¶ 79 The statutory scheme in Michigan prohibited labor unions from making political contributions from general funds, requiring them to maintain a "segregated" fund for such contributions. *Id.* at 1244. Thus, in order to solicit or obtain funds that would be used for political purposes–even from its own members, let alone nonmembers–the union had to obtain "affirmative consent" for the deduction every calendar year.

---

[9] (...continued)
The case had nothing to do with whether requiring assent prior to use of nonobjecting nonmembers' payroll deductions was constitutional. Indeed, the case stresses protection of dissenters in absence of a statutory scheme protecting them: "The fundamental right at issue is the right to be informed before making a choice whether to pay for non-chargeable expenditures." *Wagner*, 354 F.3d at 1043.

¶ 80 This is a more restrictive scheme than the Washington statute at issue since it applies to all union members while the Washington statute applies only to nonmembers.[10] But the statute mirrors Washington's in requiring "affirmative consent"–substantively identical to "affirmative authorization"–before using payroll deductions for political purposes. And even given the Michigan statute's broader effects in applying to union members, the Sixth Circuit stated:

> [T]he suggestion that asking people to check a box once a year unduly interferes with the speech rights of those contributors borders on the frivolous.

Id. at 1253.

¶ 81 The majority's treatment of this case borders on the inexplicable. It claims that the primary issue in *Miller* was the equal app-lication of the reverse checkoff to unions, corporations, non-profits, and other groups. Majority at 26 n. 6. It was nothing of the sort. The three sections of the opinion are labeled "Facts" (*id.* at 1243), "Intervention" (*id.* at 1245), and "The First Amendment and § 169.255(6)" (*id.* at 1248). There are no sections involving equal protection challenges.[11]

---

[10] The majority's attempt to distinguish *Miller* on the basis that Washington has a statute, RCW 42.17.680(3), limiting union members' payroll deductions is baffling. The fact that Washington also has a statute regulating union member payroll deductions (though in a different manner than Michigan's) doesn't affect the central premise of *Miller*– that an "opt -in" system regarding payroll deductions does not violate the First Amendment.

[11] The challenge in *Miller* was to both associational and speech rights. *Miller,* 103 F.3d at 1250. Similarly, the majority frames the issue in both political speech and associational terms. Majority at 13-14. But while the majority chooses to focus on the line of United States Supreme Court cases concerning associational (and nonassociational) rights, the

(continued...)

¶ 82 As *Miller* recognized, the suggestion that a legislative choice to protect dissenting nonmembers by requiring affirmative authorization before using their agency shop fees to influence an election or to operate a political committee violates the First Amendment to the United States Constitution "borders on the frivolous."

¶ 83 The majority claims this statute violates the First Amendment associational **[369]**rights of the *union,* citing *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

¶ 84 This argument's flaw is at its foundation: association is a two way street requiring a mutual desire to associate by all concerned. But here nonunion employees have elected *not* to associate. This does not violate the associated rights of the union or its members since it had no constitutional right to compel membership much less monetary support from nonmembers in the first place.

---

[11] (...continued)
Sixth Circuit focused on the free speech cases. Under that line of cases, the Sixth Circuit looked at whether the requirement of affirmative consent for a payroll deduction was a content-neutral restriction on the potential speech of union members who would have been funded by the payroll deduction. *Id.* at 1250-53. The majority determined that the restriction on speech was content-neutral, and in making that determination the court examined whether the statute was an invidious "attempt to limit contributions made to separate segregated funds or to favor one class of voters over another." *Id.* at 1251. The court determined that there was no invidious purpose because the "statute applies evenhandedly." *Id.* I of course agree that there is no violation of free speech rights in limiting a payroll deduction system and of course no violation of associational rights, as outlined above.

¶ 85 Moreover, this argument for unconstitutionality was never advanced by the parties and is therefore not properly considered by the court. *See* RAP 9.12 (limiting review of summary judgment to "evidence and issues called to the attention of the trial court"); *see also Nelson v. McGoldrick,* 127 Wash.2d 124, 140, 896 P.2d 1258 (1995); *Simpson Tacoma Kraft Co. v. Dep't of Ecology,* 119 Wash.2d 640, 649, 835 P.2d 1030 (1992) (refusing consideration of issues not raised before trial court); *cf. Tiffany Family Trust Corp. v. City of Kent,* 155 Wash.2d 225, 240, 119 P.3d 325 (2005) (refusing consideration of 42 U.S.C. § 1983 claim raised only in reply brief).

¶ 86 However even if it is properly before the court, it is not meritorious since this statute does not apply to union members only nonmembers who must pay agency fees because of their *refusal* to join the union. The right of these nonunion employees to refuse to join the union is itself protected by the First Amendment right of association as " '[f]reedom of association ... plainly presupposes a freedom not to associate." ' *Boy Scouts,* 530 U.S. at 563, 120 S.Ct. 2446; *Good v. Associated Students of Univ. of Wash.,* 86 Wash.2d 94, 104, 542 P.2d 762 (1975). *Boy Scouts* protected the right of nonassociation. Were this statute to apply to union dues from voluntary union members, the analysis might be arguable. But it doesn't, and it isn't.

¶ 87 The majority confuses the analysis further by referring to "the union's expressive association with agency fee payers," majority at 363, and "its [union's] expressive association with nonobjecting agency fee payers." *Id.* at 364. But there is *no* association between the union and agency fee payers because by definition these individuals have refused to join (associate

with) the union. The absence of membership defeats any claim that the regulation of statutorily required monetary support can possibly violate the right of union members to freely associate with one another for political advocacy. Rather it puts in jeopardy the First Amendment right of nonmembers to refuse to associate with a union which uses their money to advance a political agenda with which they might disagree. *That* is the concern of the First Amendment in this context, as it is the even more protective concern of RCW 42.17 .760.

> "Our Government has no more power to compel individuals to support union programs or union publications than it has to compel the support of political programs, employer programs or church programs. And the First Amendment, fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other."

Good, 86 Wash.2d at 101, 542 P.2d 762 (quoting *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 791, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (Black, J., dissenting)).

¶ 88 I dissent.

ALEXANDER, C.J., and FAIRHURST, J., concur.

APPENDIX B

UNPUBLISHED OPINION OF THE COURT OF APPEALS OF WASHINGTON

24 June 2003

[117 Wash. App. 1035]
Court of Appeals of Washington, Division 2
Gary DAVENPORT, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcot,
Respondents,
v.
WASHINGTON STATE EDUCATION ASSOCIATION,
Appellant.
No. 28375-1-II.
June 24, 2003.

* * * *

UNPUBLISHED OPINION

BRIDGEWATER, J.

This case was brought by nonunion public school employees who paid agency fees to the Washington Education Association (WEA). Plaintiffs filed a class action lawsuit to recover the fees that WEA used, without their authorization, for political purposes. But plaintiffs did not object to the use of their fees for purposes other than collective bargaining.

The trial court ruled that plaintiffs had an implied right of action under RCW 42.17.760.[1] It granted class certification to

---

[1] The statute provides:
'A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.'

(continued...)

plaintiffs on the violation of RCW 42.17.760 and conversion claims. We granted discretionary review to determine if the trial court erred.

The basis of plaintiffs' claim is RCW 42.17.760, which states that before a labor union could use a nonunion employee's agency fees for political purposes, that employee needed to give his or her affirmative authorization. Because we hold today in *State ex rel. Washington State Public Disclosure Commission v. Washington Education Association,* No. 28264-0-II (Wash. Ct.App. June 24, 2003), that RCW 42.17.760 is unconstitutional, plaintiffs, as non-objecting, nonunion employees, lose standing to sue for their un-refunded agency fees.

Reversed and remanded for dismissal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

I concur: MORGAN, P.J.

HUNT, C.J.
I concur in the majority's reversal but disagree with their reliance on WEA v State, No. 28264-0-II, (Wash. Ct.App., filed June 24, 2003), in which I dissented from the majority's holding that RCW 42.17.760 unconstitutional. Instead, I would reverse based on our recent holding in *Crisman v.*

---

[1] (...continued)
RCW 42.17.760 (emphasis added).

Pierce County Fire Protection District No. 21, 115 Wn.App. 16, 24, 60 P.3d 652 (2002), that '42 .17 RCW does not imply a private cause of action.'[2]

As we noted in Crisman, RCW 42.17.400(1) 'allows a citizen to bring an enforcement action, but only after notice to and failure by the attorney general and the prosecuting attorney to act.' *Crisman,* 115 Wn.App. at 22 (emphasis added). See also RCW 42.17.400(4). Davenport and the other plaintiffs here, however, do not fall within this exception because they did not file the required notice with the Public Disclosure Commission, the Attorney General, or the prosecuting attorney. Therefore, they have not fulfilled the prerequisite for filing a private action under RCW 42.17. *Crisman,* supra.

Accordingly, I concur in the result only.

---

[2] The trial court here did not have the benefit of our subsequent ruling in Crisman when it ruled that 42.17 RCW implies a private cause of action.

APPENDIX C

ORDER OF THE
SUPERIOR COURT OF THE
STATE OF WASHINGTON

18 January 2002

[file stamp omitted in printing]

Judge Daniel J. Berschauer
Hearing date: January 18, 2002

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON, SUSANNA SIMPSON, and TRACY WOLCOTT,	) No.01-2-00519-4
Plaintiffs, individually and on behalf of all other nonmembers similarly situated,	) CONSOLIDATED ORDER ON PENDING MOTIONS
v.	
WASHINGTON EDUCATION ASSOCIATION,	
Defendant.	

This matter coming on to be heard upon several motions: Defendant's Motion to Dismiss Claims, Plaintiffs' Motion for Class Certification, and Defendant's Motion To Stay Proceedings, the Court having considered and ruled orally on each of said Motions, and the Court having encouraged the parties to seek interlocutory appeal of said issues, for purposes

of such appeal, the Court hereby enters this Consolidated Order disposing of all said Motions.

With regard to Defendant's Motion to Dismiss, the Court considered the following:

1. Defendant's CR 12(c) Motion to Dismiss Claims;
2. Plaintiffs' Response to Motion to Dismiss Claims;
3. Declaration of Jeanne Brown and attached exhibits.
4. Defendant's Reply in Support of Motion To Dismiss Claims;
5. Declaration of Aimee S. Iverson and exhibits thereto.

With regard to Plaintiffs' Motion for Class Certification pursuant to CR 23, the Court considered the following:

1. Plaintiffs' Motion for Class Certification;
2. Declaration of Milton L. Chappell and exhibits thereto;
3. Defendant's Response to Plaintiffs' Motion for Class Certification;
4. Declaration of Judith A. Lonnquist and exhibits thereto;
5. Declaration of Aimee Iverson and exhibits thereto;
6. Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Class Certification;
7. Declaration of Milton L. Chappell in Support of Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Class Certification and exhibits thereto;
8. Plaintiffs' Supplemental Motion for Class Certification;
9. Defendant's Response to Plaintiffs' Supplemental Motion for Class Certification;
10. Declaration of Judith A. Lonnquist and exhibits thereto; and

11. Plaintiffs' Reply to Defendant's Response to Plaintiffs' Supplemental Motion for Class Certification.

With regard to Defendant's Motion To Stay of Proceedings, the Court considered the following:

1. Defendant's Motion To Stay Proceedings;
2. Declaration of Harriet K. Strasberg and exhibits thereto;
3. Plaintiffs' Response to Defendant's Motion to Stay Proceedings and exhibits attached;
4. Defendant's Reply in Support of Motion To Stay Proceedings.

The Court heard oral argument on the Motion to Dismiss Claims and the Class Certification motion on October 12, November 2 and December 7, 2001, respectively, and declined oral argument on the Motion to Stay. The Court has considered the above-described submissions as well as the argument of counsel, and makes the following rulings:

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Claims is DENIED, except as to Plaintiffs' Third Cause of Action for Breach of Fiduciary Duty which is hereby DISMISSED, with prejudice; and

IT IS FURTHER ORDERED that the applicable statute of limitations for Plaintiffs' claim under RCW 42.17.760 is five years, pursuant to RCW 42.17.410, and for the remaining claims is three years, pursuant to RCW 4.16.080.

IT IS FURTHER ORDERED that:

1. As to the first cause of action – violation of RCW 42.17.-760 – and the second cause of action – conversion – the Court certifies that under CR 23(b)(3) a plaintiff class of all public school employees who, between March 19, 1996 and August 31, 2001 (inclusive), were nonmembers paying agency shop fees to Defendant WEA without receiving a reduction or

refund for the amount WEA used to influence an election or to operate a political committee, for which the nonmembers had not given authorization.

2. As to the fourth cause of action – fraudulent concealment – the Court denies certification of a plaintiff class because the Court has found that the individual claims of reliance predominate over the common claims.

3. Pursuant to CR 23(c)(2), Defendant shall distribute an individual "opt-out" class notice, approved by the Court, to each member of the class who can be identified through reasonable effort.

IT IS FURTHER ORDERED THAT: all proceedings before this Court, including the class notice distribution referenced in paragraph 3 above, are stayed until 2/12/02 to allow either party to seek an interlocutory appeal, at the end of which time the stay shall expire, unless it is extended by the Court upon motion of either party, or by the Court *sua sponte*.

IF IS FURTHER ORDERED THAT: this Consolidated Order supersedes any previous order entered by this Court with respect to the issues addressed herein.

THE COURT takes judicial notice of the fact that a decision has been rendered in ***State of Washington ex rel. PDC v. WEA,*** Thurston County Cause No. 00-2-01837-9, which may affect the outcome of certain issues herein. The Court has been advised that an appeal thereof has been filed. The Court finds that it would conserve resources of the court and the parties if the issues determined herein were reviewed at the same time as the issues in the ***PDC*** case.

THE COURT FINDS THAT pursuit of this case, while the ***PDC*** case is appealed, especially as a class action, would be costly to the parties, drain public resources, and that an interlocutory appeal would be appropriate herein.

ACCORDINGLY, THE COURT HEREBY CERTIFIES THAT this Consolidated Order involves controlling questions of law as to which there are substantial grounds for differences of opinion and that immediate review of this Consolidated Order would materially advance the ultimate termination of the litigation.

DONE IN OPEN COURT this 18 day of January, 2002.

/s/ Daniel J. Berschauer
Judge Daniel J. Berschauer

Presented by:

/s/ Judith A. Lonnquist
Judith A. Lonnquist, WSBA #0621

/s/ Harriet Strasberg
Harriet K. Strasberg, WSBA #15890

/s/ Aimee Iverson
Aimee Iverson, WSBA #28610

Attorneys for Defendant WEA

Approved as to form; notice of presentation waived:

Steven T. O'Ban, WSBA #17265

Milton L. Chappell, *Pro Haec Vice* [sic]

Attorneys for Plaintiffs

APPENDIX D

OPINION OF THE
COURT OF APPEALS OF WASHINGTON

24 June 2003

[117 Wash. App. 625, 71 P.3d 244]
Court of Appeals of Washington,
Division 2.
STATE of Washington ex rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,
Respondent,
v.
WASHINGTON EDUCATION ASSOCIATION,
Appellant.
No. 28264-0-II.

June 24, 2003.

* * * *

[627] [245] BRIDGEWATER, J.

The State sued the Washington Education Association (WEA) alleging that it had violated RCW 42.17.760 by using non-union employees' (nonmembers) agency fees to make political expenditures without their affirmative authorization. Based on U.S. Supreme Court caselaw that (1) mandates a balancing between members' and nonmembers' First Amendment free speech and association rights, and (2) approves of a procedure that requires nonmembers to exercise their rights by objecting or "opting out," we hold that RCW 42.17.760 is unconstitutional because, by requiring an "opt in" procedure, it presumes that nonmembers object to the use of their fees for political purposes. Accordingly, we reverse.

WEA is a labor organization and the exclusive bargaining representative for some 70,000 Washington public educational employees. As bargaining representative, WEA has a statutory duty to represent every employee in the bargaining

unit, members and nonmembers alike. [1] The collective bargaining **[246]**agreement between WEA and the State includes an agency shop provision that requires all nonmembers to pay service fees; nonmembers are employees who are in the bargaining unit but who choose not to join WEA. Less than five percent of Washington public educational employees choose to be nonmembers.

Forcing nonmembers to contribute money to a labor union amounts to compelled association with the union and **[628]**impacts[2] their First Amendment free speech and association rights.[3] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[4] Nevertheless, the State's interest in facilitating collective bargaining and preventing free riders justifies the compelled association. [5] Free riders are "employees in the bargaining unit on whose behalf the union

---

[1] RCW 41.59.090.

[2] *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.").

[3] *See Roberts v. United States Jaycees*, 468 U.S. 609, 622-23, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

[4] U.S. CONST. amend. I.

[5] *Abood*, 431 U.S. at 220-22, 97 S.Ct. 1782.

[is] obliged to perform its statutory functions, but who refus[e] to contribute to the cost thereof."[6]

Members pay dues to WEA; nonmembers pay agency fees.[7] But under RCW 41.59.060(2) and RCW 41.59.100, agency fees are equivalent to member dues.[8]

A union's expenditures fall into two categories: (1) chargeable expenditures, those related to collective bargaining and representational activities; and (2) non-chargeable expenditures, those unrelated to collective bargaining, including political and ideological expenditures. Because nonmembers pay fees that are equivalent to member dues, they are, in effect, contributing funds for non-chargeable and political expenditures. This also impacts nonmembers' constitutional rights because nonmembers are compelled to make contributions for political purposes.[9]

[629]Under WEA's current practices, nonmembers who object to paying fees for the union's non-chargeable expenditures (objectors) are required to pay only the chargeable portion of the fee, the fair share fee. WEA annually calculates the fair share fee.

---

[6] *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees,* 466 U.S. 435, 447, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984).

[7] *See* RCW 41.59.060(2); RCW 41.59.100.

[8] *Leer v. Wash. Educ. Ass'n,* 172 F.R.D. 439, 442 (W.D.Wash.1997).

[9] *See Abood,* 431 U.S. at 234, 234 n. 31, 97 S.Ct. 1782.

Each fall, WEA sends letters to nonmembers notifying them of their right to object to paying fees for non-chargeable expenditures and to challenge WEA's calculation of the fair share fee. The letters include deadlines and detailed financial information regarding WEA's expenditures so that nonmembers can decide whether to object. When nonmembers object, an arbitrator determines the fair share fee. Pending the outcome of the arbitration, WEA escrows any fees that are reasonably in dispute. WEA refunds to objectors the non-chargeable portion of the fee.

Nonmembers who do not object to paying fees for non-chargeable expenditures (non-objectors) do not receive refunds. Instead, their fees are transferred from escrow to WEA's general account and commingled with member dues. WEA makes its non-chargeable expenditures from that account.

In August 2000, the Evergreen Freedom Foundation (EFF) filed a complaint with the Public Disclosure Commission (PDC) under RCW 42.17.400(4). EFF alleged that WEA was violating RCW 42.17.760 by using agency fees to make political expenditures without nonmembers' affirmative authorization. RCW 42.17.760 provides:

> **[247]**A labor organization may not *use* agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless *affirmatively authorized* by the individual.[10]

---

[10] RCW 42.17.760 (emphasis added).

To avoid another lawsuit with EFF,[11] WEA entered into a stipulation with the PDC acknowledging that it violated **[630]**RCW 42.17.760 during its 1999-2000 fiscal year. The PDC referred the matter to the Attorney General's Office for prosecution, believing that its administrative penalty was insufficient to address the stipulated violations. A larger penalty is available in superior court.[12]

The State sued WEA, alleging that it violated RCW 42.17.760 during the previous five years, 1996 to 2000.[13] Both parties moved for summary judgment.

The superior court granted the State's motion for partial summary judgment, ruling that RCW 42.17.760 requires affirmative authorization from nonmembers before a union may either collect or use agency fees for political expenditures. The court also denied WEA's motion for summary judgment, ruling that RCW 42.17.760 is constitutional, that it did not unconstitutionally amend RCW 41.59.100, and that WEA's fee collection procedures did not satisfy RCW 42.17.760's affirmative authorization requirement. The superior court reserved for trial the issue of

---

[11] *See, e.g., State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n,* 140 Wash.2d 615, 999 P.2d 602 (2000); *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n,* 111 Wash.App. 586, 49 P.3d 894 (2002).

[12] *See* RCW 42.17.390; RCW 42.17.400(5).

[13] The Public Disclosure Act, Chapter 42.17 RCW, has a five-year statute of limitations. RCW 42.17.410.

whether WEA had "used" agency fees for political expenditures.[14]

At trial, several accountants offered differing opinions on whether WEA had used agency fees to make political expenditures. The parties' jointly retained expert, Michael Gocke, testified that if there were sufficient member dues to pay for all non-chargeable expenses, then agency fees could not have been used to pay for any non-chargeable or political expenditures. Laird S. Vanetta, WEA's expert, opined that WEA had not used agency fees for political expenditures because there were sufficient additional revenues (other than dues or fees) to pay for all of WEA's political expenditures. The State's expert, Jerry Lee Baliban, opined that WEA had used agency fees for political expenditures because **[631]**once WEA commingled fees with other funds in its general account, every expenditure from that account became tainted with a proportionate share of agency fees.

In July 2001, the superior court issued a letter opinion finding that WEA had violated RCW 42.17.760. The court wrote: "WEA violates RCW 42.17.760 when it collects agency fees and then spends them for prohibited purposes in ratio to the total agency fees and dues collected *without affirmative authorization.*"[15] In its findings of fact, the court explained that "WEA used agency fees, from each [nonmember] who did not receive any refund of part of their fees, for [political]

---

[14] Clerk's Papers (CP) at 350.

[15] CP at 361 (footnote omitted).

expenditures."[16] The court adopted the "proportionality" theory that the State's expert presented, finding that "when agency fees were commingled with other funds in the general treasury, expenditure of any general treasury monies to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes."[17] In sum, the trial court found that WEA violated RCW 42.17.760 when it (1) failed to refund the non-chargeable portion of agency fees to non-objectors; (2) commingled the un-refunded fees with other revenue in its general fund; and (3) later made political expenditures from the general fund.

The superior court assessed a $200,000 penalty against WEA and then doubled the **[248]**penalty under RCW 42.17.400(5), finding that WEA had intentionally violated RCW 42.17.760.[18] The court based its finding of intent on evidence that WEA knew what the statute required but violated it anyway.[19] For example, WEA had previously

---

[16] CP at 371.

[17] CP at 373.

[18] Each violation of the Fair Campaign Practices Act, Chapter 42.17 RCW, is punishable by a penalty up to $10,000. RCW 42.17.390(3).

[19] The court found that "WEA was aware of RCW 42.17.760 and that [it] foreclosed the use of agency fees for [political expenditures] without the affirmative authorization of the fee payer." CP at 372.

[632]acknowledged that the statute "makes all [non-member]s into objectors."[20]

Finally, the superior court entered a permanent injunction and awarded costs and fees to the State. The injunction ordered WEA to implement certain measures and prohibited it from collecting agency fees that are equivalent to member dues.

I. RCW 42.17.760

WEA argues that the superior court's interpretation of RCW 42.17.760 is unconstitutional because it impinges on political speech without any sufficiently compelling government interest. We presume that a statute is constitutional, and the party challenging it must prove that it is unconstitutional beyond a reasonable doubt.[21]

A. AGENCY FEES AND THE FIRST AMENDMENT

The only authority that a union has to compel nonmembers to pay agency fees is statutory. Statutes that compel nonmembers to pay fees to a union are known as agency shop laws. Nonmembers have challenged these laws numerous times as an infringement on their First Amendment rights. RCW 41.59.060(2) and 41.59.100 compel Washington public educational employees to contribute money to WEA.

---

[20] CP at 208 (WEA's April 1998 reply memorandum supporting motion to dismiss claim brought by EFF); *accord* CP at 86 (April 2000 WEA memorandum in support of summary judgment).

[21] *Belas v. Kiga*, 135 Wash.2d 913, 920, 959 P.2d 1037 (1998).

The Constitution requires that unions finance their political and ideological expenditures (non-representational activities) with revenues from employees who do not object to advancing those ideas.[22] Thus, nonmembers who object to the union's non-representational activities (objectors) **[633]**have a constitutional right to pay only the chargeable portion of the agency fee, i.e., the fair share fee. In other words, by objecting to the union's non-representational activities, a nonmember asserts his or her First Amendment rights and cannot be compelled to pay more than his or her fair share of the union's chargeable expenditures.

In a 1961 decision, *International Ass'n of Machinists v. Street,*[23] the U.S. Supreme Court addressed whether a union "receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes."[24] The Court held that a union could not spend an objecting employee's money in such a manner. Balancing union members' constitutional rights against objectors' rights, the Court stated:

> [T]he majority [union members] also has an interest stating its views without being silenced by the dissenters [objectors]. To attain the *appropriate reconciliation between majority and dissenting interests* in the area of

---

[22] *See Ellis,* 466 U.S. at 448-55, 104 S.Ct. 1883; *Abood,* 431 U.S. at 235-36, 97 S.Ct. 1782; *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen,* 373 U.S. 113, 121-22, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 770, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (a union must not support its political activities with an objecting employee's mandatory fees.)

[23] *Street,* 367 U.S. 750, 81 S.Ct. 1784.

[24] *Street,* 367 U.S. at 749, 81S.Ct. 1784.

> political expression, we think the courts ... should select remedies which protect both interests to the maximum extent possible *without undue impingement of one on the other.*[25]

[249]Dealing with whether employees had any obligation to voice an objection, the Court stated:

> [D]issent is not to be presumed--it must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.[26]

Thus, the Court enunciated that the First Amendment free speech right was preserved by its exercise. Employees who do not want a union to use their money for political **[634]**expenditures must make their objection known to the union.

In *Abood,*[27] the Court had to determine whether the states could constitutionally permit "the use of [nonmember]s' fees for purposes other than collective bargaining."[28] The Court held that unions could use non-objectors' fees for such

---

[25] *Street*, 367 U.S. at 773, 81 S.Ct. 1784 (emphasis added).

[26] *Street*, 367 U.S. at 774, 81 S.Ct. 1784.

[27] *Abood*, 431 U.S. 209, 97 S.Ct. 1782.

[28] *Abood*, 431 U.S. at 232, 97 S.Ct. 1782.

purposes.[29] Justice Powell, in a concurring opinion joined by Justice Burger (the Chief Justice) and Justice Blackmun, noted that nonmembers must object to prevent the union from using their fees for political expenditures:

> The Court today holds that compelling an employee to finance a union's "ideological activities unrelated to collective bargaining" violates the First Amendment regardless of any asserted governmental justification. But the Court also decides that compelling an employee to finance any union activity that may be "related" in some way to collective bargaining is permissible under the First Amendment because such compulsion is "relevant or appropriate" to asserted governmental interests. *And the Court places the burden of litigation on the individual. In order to vindicate his First Amendment rights in a union shop, the individual employee apparently must declare his opposition to the union* and initiate a proceeding to determine what part of the union's budget has been allocated to activities that are both "ideological" and "unrelated to collective bargaining."[30]

Thus, in 1977, the Court again reiterated both the balance and the remedy, i.e., expression of objection, in a union or agency shop situation.

---

[29] *See Abood*, 431 U.S. at 235-36, 97 S.Ct. 1782 ("[T]he Constitution requires only that [a union's political] expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.").

[30] *Abood*, 431 U.S. at 254, 97 S.Ct. 1782 (Powell, J., concurring) (citations omitted; emphasis added).

In 1986, the Court again dealt with the situation under examination in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v.* **[635]***Hudson.*[31] there, the court cited *ABOOD* and twice stAted [sic] that nonmembers must object to prevent a union from using their fees for political expenditures.

In *Abood,* we reiterated that *the nonunion employee has the burden of raising an objection,* but that the union retains the burden of proof.

> ....
>
> ... *The nonunion employee,* whose First Amendment rights are affected by the agency shop itself and who *bears the burden of objecting,* is entitled to have his objections addressed in an expeditious, fair, and objective manner.
>
> ....
>
> ... We reiterate that ... *the nonunion employee has the burden of objection.*[32]

In sum, nonmembers who do not want the union to use their fees for non-chargeable expenditures must make their objection **[250]** known to the union.[33] After a nonmember

---

[31] *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

[32] *Hudson,* 475 U.S. at 306, 307, 309, 106 S.Ct. 1066 (emphasis added).

[33] *See Street,* 367 U.S. at 774, 81 S.Ct. 1784 ("Any remedies, however, would properly be granted only to employees who have *made known* to the union officials *that they do not desire* their funds to be used for political causes to which they object.... [O]nly those who have identified themselves as opposed to political uses of their funds are entitled to

(continued...)

objects, the union must prove that its fair share fee was correctly calculated and does not include non-chargeable expenditures.[34]

[636]B. CONSTITUTIONALLY REQUIRED AGENCY FEE COLLECTION PROCEDURES

Because the payment of fees affects nonmembers' First Amendment rights, the procedures used to collect fees must "be carefully tailored to minimize the infringement" on those rights.[35] Therefore, unions cannot exact fees from nonmembers "without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to

---

[33] (...continued)
relief.") (emphasis added); *Allen*, 373 U.S. at 119, 83 S.Ct. 1158 ("No respondent who does not in the course of the further proceedings in this case *prove that he objects* to such use [of agency fees by the union for nonrepresentational activities] will be entitled to relief.") (emphasis added); *Abood*, 431 U.S. at 235-36, 97 S.Ct. 1782 ("[T]he Constitution requires only that [nonrepresentational activities] be financed from charges, dues, or assessments paid by *employees who do not object* to advancing those ideas and who are not coerced into doing so against their will by threat of loss of governmental employment.") (emphasis added); *Hudson*, 475 U.S. at 302, 106 S.Ct. 1066 (The objective under the First Amendment " 'must be to devise a way of preventing compulsory subsidization of ideological activity by employees *who object thereto* without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.' " (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. 1782) (emphasis added))).

[34] *Hudson*, 475 U.S. at 306, 106 S.Ct. 1066.

[35] *Hudson*, 475 U.S. at 303, 106 S.Ct. 1066.

collective bargaining."[36] We address this collection procedure only to demonstrate its thoughtful construction by the Supreme Court in connection with the balancing and the remedy that they selected to resolve controversies.

In *Hudson,*[37] the Supreme Court laid out three requirements for the collection of agency fees: unions must (1) provide an "adequate explanation of the basis for the fee" (the *Hudson* notice); (2) give the objector "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"; and (3) have "an escrow for the amounts reasonably in dispute while such challenges are pending."[38] The *Hudson* notice ensures that non-members have sufficient information to decide whether to challenge the union's calculation of the fair share fee.[39]

WEA appears to follow *Hudson's* requirements. Agency fees remain in escrow until either: (1) the nonmember does not object to the union's collection of the funds, in which case the funds are released to the union; (2) the nonmember objects and accepts the union's fair share fee calculation, in which case he or she receives a refund in that amount; or (3) the nonmember objects and challenges the union's calculation, **[637]**in which case an impartial decision maker decides the

---

[36] *Abood,* 431 U.S. at 244, 97 S.Ct. 1782 (Stevens, J., concurring).

[37] *Hudson,* 475 U.S. 292, 106 S.Ct. 1066.

[38] *Hudson,* 475 U.S. at 310, 106 S.Ct. 1066.

[39] *See Hudson,* 475 U.S. at 306, 106 S.Ct. 1066 ("Basic considerations of fairness, as well as concern for the First Amendment rights at stake ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee.").

proper fee and the nonmember receives a refund in that amount.

C. RCW 42.17.760 CREATES AN "OPT IN" SITUATION.

RCW 42.17.760 relieves nonmembers of their burden of objection. Its affirmative authorization requirement creates a presumption that all nonmembers object to the use of their fees for political expenditures. Thus, RCW 42.17.760 is an "opt-in" procedure – nonmembers must give their authorization before the union may use their fees on political expenditures. The statute does not follow the Court's carefully crafted and balanced approach.

Although WEA's fee collection system might satisfy the procedures laid down in [251]*Hudson*, that alone does not satisfy the affirmative authorization requirement in RCW 42.17.760. Indeed, nonmembers who fail to object do not affirmatively authorize the union to use their fees for political expenditures.[40]

D. THE NINTH AND SIXTH CIRCUITS HAVE REJECTED OPT-IN REMEDIES

---

[40] *See* BLACK'S LAW DICTIONARY 59-60 (7th ed.1999) (defining "affirmative" as: "1. That supports the existence of certain facts < affirmative evidence>. 2. That involves or requires effort <an affirmative duty>.").

Two federal circuit courts have rejected opt-in remedies as unduly burdensome on unions. In *Mitchell*,[41] the Ninth Circuit reversed a district court that had imposed an opt-in requirement on a union's agency fee collection system. There, nonmembers argued that the union could collect fees that were equivalent to member dues only if they affirmatively consented to contribute to the union's non-chargeable expenditures.[42] Although the nonmembers had failed to object, the district court enjoined the union from collecting any more than the fair share fee from nonmembers " 'unless **[638]**the [nonmember] affirmatively consents to deduction of full union dues.' "[43]

The Ninth Circuit rejected the nonmembers' argument and reversed the district court. It relied on a "long line" of Supreme Court cases holding that nonmembers' rights are "adequately protected" when they are given the opportunity to object to paying fees that are equivalent to member dues. [44] The court noted that in *Lehnert v. Ferris Faculty Ass'n*,[45] the Supreme Court's most recent decision in the area of agency

---

[41] *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258 (9th Cir.), *cert. denied*, 506 U.S. 940, 113 S.Ct. 375, 121 L.Ed.2d 287 (1992).

[42] *Mitchell*, 963 F2d at 259.

[43] *Mitchell*, 963 F.2d at 259 (quoting *Mitchell v. Los Angeles Unified Sch. Dist.*, 744 F.Supp. 938, 945 (C.D.Cal.1990)).

[44] *Mitchell*, 963 F.2d at 260, 261, 260-62 (citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991); *Ellis*, 466 U.S. 435, 104 S.Ct. 1883; *Abood*, 431 U.S. 209, 97 S.Ct. 1782; *Allen*, 373 U.S. 113, 83 S.Ct. 1158; *Street*, 367 U.S. 740, 81 S.Ct. 1784).

[45] *Lehnert*, 500 U.S. 507, 111 S.Ct. 1950.

fees, the premise remained that employees had the burden of objecting. The Ninth Circuit then proceeded to expressly identify the remedy that they had previously acknowledged:

> There is, accordingly, no support for the [nonmember]s' position in this case that affirmative consent to deduction of full fees is required in order to protect their First Amendment rights. The Supreme Court has repeatedly held that nonunion members' rights are adequately protected when they are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs. Indeed, this court has expressly articulated the [nonmember]s' burden in *Grunwald v. San Bernardino City Unified Sch. Dist.*, 917 F.2d 1223 (9th Cir.1990). In determining the adequacy of nonunion employees' notice to the union of their objection to the full fee, we said: "The Supreme Court has clearly held that the nonunion employee has the burden of raising an objection. 'The nonmember's "burden" is simply the obligation to make his objection known.' " *Id.* at 1229 (citation omitted) (quoting *Hudson*, 475 U.S. at 306 n. 16, 106 S.Ct. at 1075 n. 16).[46]

The Ninth Circuit then addressed the nonmembers' argument that their right not to pay for non-chargeable **[639]**expenditures was analogous to a criminal defendant's constitutional rights and thus required their intentional relinquishment of the right. The court rejected the analogy:

> The case before us ... reveals none of the coercive elements so palpable in a police confrontation. The Supreme Court has never suggested that employees who are offered the opportunity to object to the union fee

---

[46] *Mitchell*, 963 F.2d at 261.

> deduction and do not do so act under any compulsion. There is thus no basis, either factual or legal, for the district court's conclusion that plaintiffs were **[252]**"compelled" to acquiesce, in violation of their First Amendment rights.[47]

Instead, the court found a closer analogy in the "opt-out" procedure for class action lawsuits. An "opt-in" procedure, the court found, "would *unduly impede* the union in order to protect the 'relatively rare species' of employee who is unwilling to respond to the union's notifications but nevertheless has serious disagreements with the union's support of its political and ideological causes."[48]

In *Weaver*,[49] the Sixth Circuit held that nonmembers' silence after sufficient opportunity to object from paying for non-chargeable expenses could indicate acquiescence. The court relied on the line of cases requiring employees to object to the use of their funds for non-chargeable expenditures and the Ninth Circuit's decision in *Mitchell*.[50]

> [T]he [nonmember]s' argument [that silence cannot be construed as waiver of the right to object from paying for non-chargeable expenditures] must fall because it seeks

---

[47] *Mitchell*, 963 F.2d at 262.

[48] *Mitchell*, 963 F.2d at 263 (emphasis added).

[49] *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523 (6th Cir.1992), *cert. denied*, 507 U.S. 917, 113 S.Ct. 1274, 122 L.Ed.2d 668 (1993).

[50] *Weaver*, 970 F.2d at 1532 (citing *Hudson*, 475 U.S. 292, 106 S.Ct. 1066; *Abood*, 431 U.S. 209, 97 S.Ct. 1782; *Allen*, 373 U.S. 113, 83 S.Ct. 1158; *Street*, 367 U.S. 740, 81 S.Ct. 1784; *Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956).

> to *shift the balance of interests* underlying all of the Supreme Court's pronouncements on the subject of agency shop fees. An "opt-in" procedure would *greatly burden* unions while offering only a **[640]**modicum of control to nonunion employees whose procedural rights have already been safeguarded by *Hudson.*[51]

RCW 42.17.760's affirmative authorization requirement, like the opt-in procedure imposed by the district court in *Mitchell,* would unduly require a union to protect nonmembers who disagree with a union's political expenditures but are unwilling to voice their objections. The procedures imposed on unions by federal law fully protect nonmembers' First Amendment rights. Further restrictions, such as an opt-in procedure, upset the balance between nonmembers' rights and the rights of the union and the majority.[52]

Furthermore, in *Allen,*[53] the Court acknowledged a union's right to spend nonobjectors' fees on political expenditures: "no decree would be proper which appeared likely to infringe on the *unions' right* to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters'

---

[51] *Weaver,* 970 F.2d at 1533 (emphasis added).

[52] *See Abood,* 431 U.S. at 238, 97 S.Ct. 1782 ("[T]hose union members who do wish part of their dues to be used for political purposes have a right to associate to that end 'without being silenced by the dissenters.' " (quoting *Street,* 367 U.S. at 772-73, 81 S.Ct. 1784)); *see also supra* note 33.

[53] *Allen,* 373 U.S. 113, 83 S.Ct. 1158.

such exactions in support of political activities." [54] The affirmative authorization requirement in RCW 42.17.760 also ignores a union's right to use non-objectors' agency fees on political expenditures.

RCW 42.17.760's affirmative authorization requirement unduly burdens unions. RCW 42.17.760 is unconstitutional in light of the U.S. Supreme Court caselaw and the reasoning articulated by the Ninth Circuit. Because all other decisions of the trial court hinged on the constitutionality of RCW 42.17.760, we do not address them. We reverse **[641]**the trial court's judgment, including the injunction,[55] attorney fees, and penalties.

II. Attorney Fees

WEA requests its attorney fees and costs at trial and on appeal.[56] WEA has now **[253]**prevailed. Accordingly, we remand to the trial court with directions to determine (1) whether WEA should receive the costs and attorney fees that it reasonably incurred at the trial level; (2) the amount of the same, if any; and (3) the amount of costs and attorney fees that WEA has reasonably incurred on this appeal.

---

[54] *Allen*, 373 U.S. at 122, 83 S.Ct. 1158 (emphasis added).

[55] The trial court's injunction ignores that RCW 41.59.060(2) grants a union the right to collect fees equivalent to member dues.

[56] *See* RCW 42.17.400(5) ("If the defendant prevails, he shall be awarded all costs of trial, and may be awarded a reasonable attorney's fee to be fixed by the court to be paid by the state of Washington."); RAP 18.1 (attorney fees are allowed on appeal only if authorized by applicable law); *Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wash.App. 569, 576, 928 P.2d 1149 (1997) (statute authorizing fees to the prevailing party at trial authorizes fees on appeal).

Reversed.

I concur: MORGAN, P.J.

HUNT, C.J.

I respectfully concur in part and dissent in part. I agree with the majority that under RCW 42.17.760, the union may *collect* agency fees, including those it ultimately intends to use for political purposes. But I disagree with the majority's conclusion that the sta-tute is unconstitutional in prohibiting the political *use* of fees col-lected from nonmembers without their prior affirmative authorization.

I also concur in the majority's reversal of penalties assessed against the WEA. On the record before us, it appears that the WEA was operating under a good faith belief that its actions were lawful so long as it refunded agency fees to nonmembers upon request and used for political purposes only those nonmember fees for which employees had not expressly requested rebates.

[642]I. CONSTITUTIONALITY OF STATUTE

RCW 42.17.760, entitled, "Agency shop fees as contributions," provides:

> A labor organization may not *use* agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, *unless affirmatively authorized* by the individual.

(Emphasis added.) The cases the majority cites do not hold that the Constitution bars a statutory provision, such as RCW

42.17.760, which requires a nonmember employee's affirmative authorization before a union can use his or her agency fee for political purposes.

For example, at pages 248 and 249 of their opinion, the majority cites two Railway Labor Act cases, *International Ass'n of Machinists v. Street,* 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), and *Brotherhood of Railway and Steamship Clerks v. Allen,* 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), for the proposition that an "opt in" provision is not constitutionally required; with this proposition I agree. But these cases do not support the converse, advanced by the majority here, that an "opt in" provision such as Washington's is constitutionally barred.

Similarly, in a First Amendment case also cited by the majority, *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Supreme Court held that a public teachers' union may not use a nonmember's agency fees to underwrite the union's political activity over the nonmember's objection. In so holding, the Court sought to craft a fee-collection procedure that would prevent compulsory subsidization of ideological activity by employees who object thereto [1] without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities **[643]**and [2] without allowing "union members who do wish part of their dues to be used for political purposes ... [to be] silenced by the dissenters." *Abood,* 431 U.S. at 237-38, 97 S.Ct. 1782 (citation omitted). In crafting this remedy, the Court sought "guidance" from *Street* and *Allen,* reciting that "dissent is not to be presumed." *Abood,* 431 U.S. at 237-38, 97 S.Ct. 1782. Nonetheless, *Abood* does not expand this clause to hold that that an "opt in"

procedure is constitutionally impermissible, as the majority here infers.[57]

[254]*Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), supports this limited reading of *Abood* as stopping short of finding a constitutional requirement that the burden of dissent rests on the objecting employee. The Court noted that *Street, Allen,* and *Abood* "did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies."[58] *Ellis,* 466 U.S. at 443, 104 S.Ct. 1883.

Similarly, in *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Court addressed whether a specific union procedure adequately protected a dissenting employee's right to "prevent the Union[ ] [from] spending a part of [his] required service fees to contribute to political [activity] ... unrelated to its duties as exclusive bargaining representative." *Hudson,* 475 U.S. at 302, 106 S.Ct. 1066 (citations and quotations omitted). The Court repeatedly stated that under that specified union procedure, the employee bore the burden of objecting.

---

[57] Moreover, Justice Stevens left the door open for alternative remedies. *Abood,* 431 U.S. at 244, 97 S.Ct. 1782 (Stevens, J. concurring). Only Justice Powell, as the majority here notes at page 249, reads the majority opinion in *Abood* as placing the burden of dissent on the objecting employee. *Abood,* 431 U.S. at 254-55, 97 S.Ct. 1782 (Powell, J. concurring). In contrast, the majority in *Abood* does not go so far as to hold that the Constitution *requires* the burden of dissent to be placed on the objecting employee.

[58] Although in *Abood,* the Court did mention placement of the burden of dissent in the context of its discussion on remedies, *Abood,* 431 U.S. at 237-38, 97 S.Ct. 1782, in *Ellis,* it neither mentioned nor addressed the burden of dissent.

Hudson, 475 U.S. at 306-07, 309, 106 S.Ct. 1066. Again, however, the Court **[644]**did not hold that the Constitution *mandates* that such burden rest on the employee.[59]

In *Mitchell v. Los Angeles Unified School District,* 963 F.2d 258 (9th Cir.1992), the Ninth Circuit Court of Appeals addressed the constitutional sufficiency of a school district union's "opt out" procedure for nonmember employees. The employees argued that an "opt in" procedure was constitutionally required, to which the Court responded that "the Constitution does not *mandate* a system under which nonmembers pay full union dues only if they 'opt in.'" *Mitchell,* 963 F.2d at 260 (emphasis added). The Ninth Circuit read the Supreme Court opinions mentioned above as holding "that nonunion members' rights are adequately protected when they are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs." *Mitchell,* 963 F.2d at 261. Similar to these Supreme Court opinions, however, in *approving* an "opt out" procedure, the *Mitchell* Court did not hold that the Constitution *requires* an "opt out" procedure in lieu of an "opt in" procedure like the one at issue here.

In short, the cases that the majority cites simply uphold "opt out" procedures as constitutional. None, however, hold that the Constitution *requires* an "opt out" procedure or that the burden of dissent must be on the objecting employee. Further, none of these cases hold that a statutory "opt in" procedure, such as the one in RCW 42.17.760, is constitutionally infirm,

---

[59] Nor did the *Hudson* Court question the constitutionality of placing such a burden on the dissenting employee.

contrary to the majority's finding here that an "opt out" procedure is constitutionally mandated.

II. STATUTORY LIMITATIONS

Washington's statutory scheme allows unions to collect fees and dues from union members and equivalent agency fees from non-union members. RCW 41.59.100; RCW 41.59.060(2). **[645]**Although employees have the right to refrain from joining a union, they may nonetheless be required to pay "a fee to any employee organization under an agency shop agreement." 41.59.060(1). But the union cannot spend such non-members' fees for political purposes without such employees' affirmative authorization. RCW 42.17.760. Rather, non-authorizing nonmembers are entitled to rebates of that portion of their agency fees that would have gone for union political expenses. RCW 42.17.760.

Here, the parties' jointly retained expert, Michael Gocke, testified that member dues alone were sufficient to cover all WEA political expenses. But the practical effect of such a scheme would be to shift a disproportionate share of the collective bargaining expenses onto nonmembers' agency fees: In essence, the non-members would pay a portion of the members' share of the collective bargaining expenses, thus freeing up a larger share of the members' dues for political expenses. **[255]**Such a scheme appears to contra-dict the Legislature's goals of (1) equal allocation of collective bargaining expenses between members and non-members, (2) equal allocation of political expenses between members and affirmatively assenting non-members, and (3) retention of the political expense portion of agency fees to non-assenting

non-members. *See* RCW 41.59.060(1); RCW 41.59.100; RCW 42.17.760.

Even taking the evidence here in the light most favorable by the WEA, the record supports the trial court's findings that

> WEA violates RCW 42.17.760 when it collects agency fees and then spends them for prohibited purposes in ratio to the total agency fees and dues collected *without affirmative auth-orization.*

Clerk's Papers (CP) at 361.

> WEA used agency fees, from each [nonmember] who did not receive any refund of part of their fees, for [political] expenditures.

CP at 371.

[646]Accordingly, I would affirm the trial court's conclusion of law that

> [w]hen agency fees were commingled with other funds in the general treasury, expenditure of any general treasury monies to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes.

CP at 373. I would also uphold the trial court's injunction prohibiting the WEA from collecting agency fees, equivalent to member dues, from nonmembers who do not first affirmatively authorize a portion for political expenditures as the Legislature has prescribed in RCW 42.17.760.

III. PENALTIES

I would affirm the trial court's finding that the WEA contravened the plain, and constitutional, language of RCW 42.17.760 when (1) it knowingly collected nonmember fees,

in part for political expenditures, without those nonmembers' prior affirmative authorization; and (2) refunded such fees only when a nonmember specifically requested a rebate. Therefore, I dissent from the majority's contrary holding on this point.

But I concur in the majority's reversal of the penalties assessed against the WEA. The record shows that the WEA had a good faith basis for relying on its interpretation of the statute and for requiring nonmembers to request rebates following collection of agency fees. Clearly, the WEA read and interpreted the Supreme Court cases in a manner consistent with my learned colleagues' reading as rendering the "opt in" collection method unconstitutional. In spite of my dissention from the majority's legal conclusion as to the constitutionality of the statute, I do not find the penalties against WEA warranted and, therefore, I concur in the majority's reversal of the penalties assessed below.

APPENDIX E

ORDER OF THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

10 May 2001

[file stamp omitted in printing]
IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, ex. rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, Plaintiff, vs. WASHINGTON EDUCATION ASSOCIATION, Defendant.	NO. 00-2-01837-9 ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT Hearing Date: 5/4/01

THIS MATTER having come on for the Court's consideration based upon the Defendant's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment, and the Court having considered records and files herein, the arguments of the parties in open court, and being otherwise fully advised; and the Court having considered the following:

1) Defendant's Motion for Summary Judgment;
2) Defendant's Memorandum in Support of Summary Judgment;
3) Declaration of Thomas Hedges;
4) Declaration of James S. Seibert and exhibits thereto;

5) Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment and attachments thereto;
6) Declaration of D. Thomas Wendel for Defendant's Summary Judgment, and exhibits thereto;
7) Defendant's Reply Memorandum in Support of Summary Judgment;
8) Declaration of Harriet Strasberg (4/30/2001) and exhibits thereto;
9) Second Declaration of James S. Seibert;
10) Plaintiff's Motion for Partial Summary Judgment
11) Memorandum Supporting Plaintiff's Motion for Partial Summary Judgment;
12) Declaration of D. Thomas Wendel for Partial Summary Judgment and exhibits thereto;
13) Defendant's Response to Plaintiff's Motion For Summary Judgment;
14) Declaration of Harriet Strasberg (4/23/2001) and exhibits thereto;
15) Declaration of James D. Oswald and exhibits thereto;
16) Plaintiff's Reply Memorandum for Partial Summary Judgment;
17) Declaration of D. Thomas Wendel for Summary Judgment Reply and exhibit thereto; and
18) Supplemental Declaration of D. Thomas Wendel for Summary Judgment Reply and exhibits thereto.

THE COURT HEREBY CONCLUDES AS FOLLOWS:

1. RCW 42.17.760 is constitutional.
2. RCW 42.17.760 does not unconstitutionally amend RCW 41.59.100.
3. RCW 42.17.760 requires affirmative authorization from agency fee payers, albeit not necessarily written by the fee

payer, before Defendant may collect or use fees to influence an election or to support a political committee, and defendant's "Hudson" procedures do not satisfy this requirement.

4. Defendant has collected, without the required affirmative authorization, agency fees to be used to influence an election or to support a political committee.
5. There is an issue of fact whether Defendant in this case has, in fact, used agency fees to influence an election or to support a political committee.

ACCORDINGLY, IT IS HEREBY ORDERED THAT: Defendant's Motion for Summary Judgment is DENIED; Plaintiff's Motion for Partial Summary Judgment is GRANTED, in part; and the issues set forth in paragraph 5 above shall be determined in the trial scheduled to be begin on May 14, 2001.

DONE IN OPEN COURT this 10th day of May, 2001.

/s/ Gary R. Taber
Judge Gary R. Taber

Presented by:

Telephonic Approval
D. Thomas Wendel, WSBA #15445
Attorney for Plaintiff

Approved as to form,
Notice of Presentation Waived:

/s/ Judith A. Lonnquist
Judith A. Lonnquist, WSBA #06421
Attorney for Defendant

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION
First Amendment

The **First Amendment** provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The **Fourteenth Amendment** provides in pertinent part:

> **Section 1.** . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASHINGTON FAIR CAMPAIGN PRACTICES ACT

The **Washington Fair Campaign Practices Act, § 760**; RCW 42.17.760 provides:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

Nos. 05-1589, 05-1657

FILED

AUG 14 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

GARY DAVENPORT, *et al.*,
Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

---

BRIEF IN OPPOSITION

JUDITH A. LONNQUIST
1218 Third Avenue, Suite 1500
Seattle, WA 98101
(206) 447-9186

HARRIET STRASBERG
3136 Maringo SE
Olympia, WA 98501
(360) 754-0304

JOHN M. WEST
(*Counsel of Record*)
LAURENCE GOLD
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

The federal government and the great majority of the states regulate union and corporate political contributions and expenditures in various ways and to various degrees. Of all these jurisdictions the State of Washington *alone* has made it unlawful for a union to finance what would otherwise be lawful political advocacy as a matter of state law (and what is lawful political advocacy financed with treasury funds by corporations)—including contributions in support of or in opposition to ballot propositions, independent political expenditures, and internal political communications—from a general fund made up primarily of union members' dues moneys and secondarily of employee-nonmembers' agency fee payments, unless the union has secured the affirmative consent of each individual payer of an agency fee to the financing of the union's political advocacy through the union's treasury moneys. Washington does so even though the interest of the employee-nonmembers who pay agency fees, which is asserted as justifying the prohibition, is already protected by the fee-payers' constitutional "objection" right not to pay the union an amount equal to the portion of union dues that goes for the union's political and other expenditures not germane to collective bargaining.

The question thus presented is:

Whether, as the Washington Supreme Court held, the State of Washington's *sui generis* regulation of union political expression through Wash. Rev. Code § 42.17.760 impermissibly burdens the First Amendment right of unions and their members to free speech by creating an "insurmountable . . . hurdle[] . . . to engag[ing] in political speech" that is not narrowly tailored to advancing any compelling governmental interest?

CORPORATE DISCLOSURE STATEMENT

Respondent Washington Education Association is organized as a nonprofit corporation. It has no parent corporation, and no publicly held company owns any stock in it.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT	2
ARGUMENT	8
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 3
Buckley v. Valeo, 424 U.S. 1 (1976) 16, 17
Chicago Teachers Union v. Hudson, 475 U.S. 29 1986) 4
Crisman v. Pierce County Fire Prot. Dist. No. 21, 60 P.3d 652 (Wash. Ct. App. 2002) 8
FEC v. Beaumont, 539 U.S. 146 (2003) 17, 18
FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 10, 17, 18
FEC v. National Right to Work Committee, 459 U.S. 197 (1982) 17, 18
First National Bank v. Bellotti, 435 U.S. 765 (1978) 10, 16, 18
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 3
Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) 13
Michigan State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997) 14
Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) 18
Randall v. Sorrell, 126 S. Ct. 2479 (2006) 10
Smith v. Arkansas State Highway Employees Local 1315, 441 U.S. 463 (1979) 15
South Carolina Education Association v. Campbell, 883 F.2d 1251 (4th Cir. 1989) 13
State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n, 999 P.2d 602 (Wash. 2000) 9, 15

TABLE OF AUTHORITIES—Continued

	Page
State ex rel. Washington State Public Disclosure Commission v. Washington Education Association, 130 P.3d 352 (Wash. 2006)	1
United States v. Boyle, 482 F.2d 755 (D.C. Cir. 1973)	15
STATUTES	
2 U.S.C. § 441b	16
2 U.S.C. § 441b(a)	18
2 U.S.C. § 441b(b)(2)(A)	17
2 U.S.C. § 441b(b)(2)(C)	17
18 U.S.C. § 610 (1970)	15
Md. Code Ann., Educ. § 6-504(d)(3)(iv)(1)	11
Md. Code Ann., Educ. § 6-504(d)(3)(iv)(2)	11
Mont. Code Ann. § 39-31-402(3)	11
Mont. Code Ann. § 39-32-109(2)(d)	11
Wash. Rev. Code §§ 28B.52.010 *et seq.*	2
Wash. Rev. Code § 28B.52.045	3
Wash. Rev. Code § 28B.52.045(2)	3
Wash. Rev. Code §§ 41.56.010 *et seq.*	2
Wash. Rev. Code § 41.56.120	3
Wash. Rev. Code § 41.56.122(1)	3
Wash. Rev. Code § 41.56.080	2
Wash. Rev. Code §§ 41.59.010 *et seq.*	2
Wash. Rev. Code § 41.59.060(2)	3
Wash. Rev. Code § 41.59.090	2
Wash. Rev. Code § 41.59.100	3
Wash. Rev. Code §§ 41.76.001 *et seq.*	2
Wash. Rev. Code § 41.76.015	2
Wash. Rev. Code § 41.76.040	3
Wash. Rev. Code § 41.76.045(2)	3
Wash. Rev. Code § 42.17.020(17)	5
Wash. Rev. Code § 42.17.020(38)	5

TABLE OF AUTHORITIES—Continued

Page

Wash. Rev. Code §§ 42.17.350 *et seq.* 5
Wash. Rev. Code § 42.17.680(3)..... 14, 15
Wash. Rev. Code § 42.17.760 ..... *passim*

IN THE

Supreme Court of the United States

Nos. 05-1589, 05-1657

GARY DAVENPORT, *et al.*,
Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

---

BRIEF IN OPPOSITION

Respondent Washington Education Association respectfully urges the Court to deny the above-styled Petitions for Writ of Certiorari, both of which seek review of the decision of the Washington Supreme Court in *State ex rel. Washington State Public Disclosure Commission v. Washington Education Association*, 130 P.3d 352 (Wash. 2006).

STATEMENT

A. The Washington Education Association ("WEA") is a labor organization which, through its 370 local affiliates, acts as the exclusive bargaining representative of over 70,000 teachers and other educational employees of public school districts, community colleges, and universities in the State of Washington under Washington's Educational Employment Relations Act, Wash. Rev. Code §§ 41.59.010 *et seq.*, and other statutes governing public employment.[1]

Like most labor organizations, WEA works to advance the interests of the employees it represents through a variety of forms of concerted activity, ranging from the negotiation and enforcement of collective bargaining agreements to political advocacy. During the years at issue in this litigation, WEA's political advocacy expenditures required to be reported to the state Public Disclosure Commission varied between 0.5% and 3.2% of its total expenditures.

Just over 95% of the employees WEA represents have chosen to join WEA as union members and pay union dues into WEA's general fund from which the union finances its activities. The remainder of those employees, fewer than 5%, have chosen not to become WEA members (and consequently have no obligation to pay such dues).

Washington law requires that a public-sector union like WEA represent the employee-union members and the employee-nonmembers in its bargaining units on an equal basis. Wash. Rev. Code §§ 41.59.090, 41.56.080, 41.76.015. To

---

[1] The vast majority of the employees represented by WEA are covered by the Educational Employment Relations Act, which applies to certificated employees in elementary and secondary schools. Classified employees are subject to the Public Employees' Collective Bargaining Act, Wash. Rev. Code §§ 41.56.010 *et seq.*, while the labor relations of community college and university faculty members are governed respectively by Wash. Rev. Code §§ 28B.52.010 *et seq.* and §§ 41.76.001 *et seq.*

spread the financial burden of this required equal representation among union members and nonmembers, Washington—like approximately half of the states—allows public-sector unions to negotiate collective bargaining agreements that require payment of an "agency fee" to the union by the employee-nonmembers the union is required to represent. Wash. Rev. Code § 41.59.100; *see also id.*, §§ 28B.52.045, 41.56.120, 41.76.040. Washington statutes allow the collection of an agency fee in an amount "equal to the fees and dues required of membership in the [union]." Wash. Rev. Code § 41.59.060(2); *see also id.*, § 41.59.100.[2] Under the statutes covering the vast majority of the employees WEA represents, the employer implements the agency fee provision by deducting the agency fee from the employee-nonmember's salary payments and remitting it to the union. Wash. Rev. Code §§ 41.59.100, 41.76.045(2), 28B.52.045(2).

This Court has long recognized the important public purposes served by an agency fee system and the permissibility of that system under the First Amendment. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220-22 (1977). At the same time, in deference to the employee-nonmembers' First Amendment nonassociational rights, the Court has ruled that employee-nonmembers who have an objection to paying for a union's political and ideological activities can only be required to pay a reduced agency fee that is equal to the portion of union dues that is expended for purposes germane to collective bargaining and thus is constitutionally "chargeable" to objecting nonmembers. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). In addition, the Court has held that unions that have negotiated an agency fee provision must give employee-nonmembers notice of the amount and nature

---

[2] While lacking this explicit language of the Educational Employment Relations Act, the other relevant labor relations statutes similarly impose no limit on the agency fee a union may collect. *See* Wash. Rev. Code §§ 28B.52.045(2), 41.56.122(1), 41.76.045(2).

of the union's "chargeable" and "nonchargeable" expenditures and the opportunity to register their objection to paying the portion of union dues that corresponds to the union's expenditures that are not germane to its collective bargaining functions. *See generally Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Consistent with these constitutional requirements, WEA annually provides each employee-nonmember subject to an agency fee requirement with a "*Hudson* notice" explaining the union's breakdown of its chargeable and nonchargeable expenditures for the relevant fiscal year and offering, to any nonmember who informs the union of his or her objection, a reduction in the fee corresponding to the nonchargeable expenditures.[3]

Payroll deductions received by WEA from employers, consisting of the union dues of members and the agency fees of nonmembers, are deposited in WEA's general fund. Just over 95% of the WEA general fund's receipts come from union members' dues, and just under 5% from nonmembers' agency fees. WEA makes its various disbursements, including the political expenditures that are at issue in this litigation, from its general fund.

B. In 1992 Washington voters adopted through Initiative 134 a Fair Campaign Practices Act, codified in Title 42, Chapter 17 of the Washington Revised Code. Section 760 of the Act, at issue in this litigation, provides as follows:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

---

[3] In addition, feepayers who so request are entitled to a review by an independent arbitrator of the union's calculation of the chargeable percentage of its expenditures.

Wash. Rev. Code § 42.17.760 [hereinafter "Section 760"]. Section 760's restriction on political contributions and expenditures extends not only to contributions to political candidates and to expenditures relating to elections for public office, but also to contributions and expenditures relating to ballot initiatives and referenda. *See id.*, § 42.17.020(17) (defining "election" to include any "election for public office and any election in which a ballot proposition is submitted to the voters"); *id.*, § 42.17.020(38) (defining "political committee" as an entity making expenditures "in support of, or opposition to, any candidate or any ballot proposition").

C. Prior to 2000 and the institution of this litigation, the Public Disclosure Commission ("PDC")—the administrative agency charged with administration and enforcement of the Fair Campaign Practices Act, *see* Wash. Rev. Code §§ 42.17.350 *et seq.*—had never sought to enforce Section 760, nor had that section been the subject of any judicial interpretation, agency rulemaking, or other guidance from the PDC. *See* Pet. App. 9a.[4] Then, in October 2000, the Washington Attorney General, upon referral from the PDC, brought this case against WEA in Thurston County Superior Court. The complaint alleged violations of Section 760 between 1996 and 2000 based on WEA's political expenditures and on its contributions to political committees supporting or opposing various ballot propositions—such as ballot questions on education-related public policy issues concerning charter schools, private school vouchers, and class size reduction in the public schools.[5]

---

[4] Except as otherwise noted, appendix citations are to the Appendix submitted by petitioner in No. 05-1657.

[5] WEA's political contributions at issue do not include any contributions to candidates for public office. Such candidate contributions were not made from WEA's general treasury but instead by its political action committee WEA-PAC, which was funded by separate earmarked contri-

In its initial ruling, the trial court held (i) that Section 760 was constitutional; and (ii) that an agency fee payer's failure, in response to WEA's "*Hudson* notice," to file an objection and request a reduction in his or her agency fee corresponding to WEA's nonchargeable expenditures—a broader category than the political disbursements identified by Section 760—did not constitute "affirmative authorization" within the meaning of the statute. Pet. App. 115a.

An ensuing bench trial focused on the question of whether, by making political expenditures and contributions from its general fund, WEA had "used" agency fees for those purposes. Two of the three accountants to testify at trial, including an independent expert jointly retained by the parties, opined that, under the circumstances at issue in this case, the mere commingling of agency fees in WEA's general fund was an insufficient basis for concluding that WEA had "used" such fees for the political purposes identified by Section 760. *See id.* at 53a-54a. Notwithstanding that testimony, the trial court concluded that "when agency fees were commingled with other funds in the general treasury, expenditure of any general treasury monies to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes." *Id.* at 99a.

Having found a violation of the statute, the court imposed as a "punitive sanction" a civil penalty of $400,000 plus costs and attorney's fees. *Id.* at 111a-112a. The court also entered a permanent injunction requiring WEA in future years to reduce the fee to be paid by (nonobjecting) agency feepayers by "the percentage of the WEA's total expenditures that are analyzed to have been used for § 760 expenses in the second fiscal year prior" plus a "cushion" of 3 percent. *Id.* at 88a-

---

butions of WEA members. WEA-PAC contributions and expenditures are not at issue in this litigation.

89a. The injunction defined Section 760 expenses to include "all political advertising expenditures, as well as direct and in-kind contributions, internal political communications, and independent expenditures." *Id.* at 85a.

In the meantime, five agency feepayers, petitioners in No. 05-1589, brought a class action lawsuit against WEA in the same court, asserting an implied private right of action under Section 760 as well as various tort theories—all predicated on the alleged violation of Section 760—and seeking to recover portions of the agency fees they had paid. The trial judge dismissed one of the tort claims, allowed the others to go forward, certified a class as to certain claims, and stayed further proceedings while certifying his ruling for interlocutory appeal. *Davenport* Pet. App. 45a.

The two cases were heard together on appeal. WEA raised multiple issues, including the constitutionality of Section 760, whether WEA's *Hudson* process constituted the "affirmative authorization" required by the statute, whether under the circumstances agency fees had been "used" for political purposes, whether any violation of the statute had been intentional, and—as to the *Davenport* case—whether plaintiffs had stated a cause of action under Section 760 and their various tort theories. The court of appeals reached only the first of these issues, relying on this Court's agency fee jurisprudence to hold Section 760 unconstitutional. Pet. App. 48a; *see also Davenport* Pet. App. 42a.[6]

---

[6] Judge Hunt disagreed with the majority's view that the statute was unconstitutional, *see* Pet. App. 70a-77a, but—finding that WEA had had a good faith basis for its belief that it had complied with the statute—she concurred with the majority in holding that all penalties against WEA should be vacated. *Id.* at 78a. In the *Davenport* case, Judge Hunt concurred in the result, holding that the trial court's ruling should be reversed on the basis of an intervening appellate decision holding "that '42.17 RCW does not imply a private cause of action.'" *Davenport* Pet. App.

The Washington Supreme Court granted discretionary review and affirmed the judgment of the court of appeals. Pet. App. 1a. The court addressed two issues. It first held that, while the statutory requirement of "affirmative authorization" did not mean *written* authorization, and while "the State was unable to specify what form of authorization would satisfy the requirement of affirmative authorization," *id.* at 11a, a feepayer's "[f]ailure to respond to the *Hudson* packet ... would not fulfill the affirmative authorization requirement." *Id.* at 10a.

The Washington Supreme Court therefore turned to the question whether the statute, so construed, was constitutional. Answering that question in the negative, the court below held that Section 760 burdened the right of WEA and its members to engage in political speech and did so without narrow tailoring to a compelling governmental interest. *Id.* at 26a-27a, 32a-34a.

ARGUMENT

The certiorari petitions do not present any legal question of general importance warranting this Court's review. The Washington Supreme Court applied well settled constitutional principles to invalidate a *sui generis* Washington state statute that cuts deeply into the right of unions like WEA to engage in political speech through such means as political advertising and internal political communications, and that has no analogue in federal, or any other state, campaign practices law. The Washington court's decision is, moreover, carefully limited to the unique aspects of that Washington state statute. Precisely because that is so, and contrary to the certiorari petitions' claims, the Washington Supreme Court's decision is plainly not in conflict with any of the decisions of other

---

43a-44a (citing *Crisman v. Pierce County Fire Prot. Dist. No. 21*, 60 P.3d 652 (Wash. Ct. App. 2002)).

courts cited by petitioners. The certiorari petitions should therefore be denied.

I.

The State of Washington, in common with many other states, permits unions and corporations to finance a wide range of political advocacy out of the union's or corporation's treasury money in its general fund.[7] But through Section 760 the State of Washington *alone* limits that permission by making it unlawful for a union to finance what would otherwise be lawful political advocacy out of a general fund made up primarily of its members' dues and secondarily of agency fee moneys—unless the union has secured the affirmative consent of each individual payer of an agency fee to the financing of the union's political advocacy through the union's treasury.

A. As the Washington Supreme Court recognized, and as is apparent on the face of things, Section 760 cuts deeply—and discriminatorily—into the First Amendment associational right of unions like WEA to engage in political advocacy that is financed almost entirely by members' dues moneys and only to a very small extent by agency fee moneys. In practical terms, Section 760 would silence the political advocacy of the unions like WEA that finance their advocacy out of general funds that consist overwhelmingly of members' dues money, by creating the "insurmountable . . . hurdle[]," Pet. App. 19a, of securing the affirmative consent to engage in such advocacy of each and every one of the individuals who pays an agency fee into the union's general fund.

Moreover, the Washington Supreme Court was surely on solid doctrinal ground in recognizing that this unique draconian restriction on the First Amendment rights of WEA to use

---

[7] *See State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 999 P.2d 602, 611 (Wash. 2000).

its general treasury funds for independent political expenditures and for contributions supporting or opposing ballot initiatives could pass constitutional muster only if it was justified by a compelling governmental interest and was narrowly tailored to protecting that interest. *See, e.g., Randall v. Sorrell*, 126 S. Ct. 2479, 2487-89 (2006); *First National Bank v. Bellotti*, 435 U.S. 765 (1978). And, it is difficult—we would say all but impossible—to fault the Washington court's highly particularized conclusion that Section 760 fails that constitutional test.

The court below rejected as "disingenuous" the State's contention "that § 760 has no impact on the First Amendment rights of [union] members" and their "ability to assert their collective political voice." Pet. App. 19a. Citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the Washington court observed that "[c]ampaign finance legislation can create insurmountable organizational and financial hurdles for organizations attempting to engage in political speech, rendering the legislation unconstitutional." Pet. App. 19a. Here, the court below explained, "the statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech." *Id.* at 30a-31a (emphasis in original). Such "a restriction on the First Amendment rights of WEA must be justified by a *compelling* governmental interest." *Id.* at 26a (emphasis in original). And here "the only interest asserted is additional protection for nonmembers' First Amendment rights." *Id.*

That interest, the Washington court held, was fully protected by the *Hudson* process that WEA already provided in compliance with the requirements of the First Amendment, and was not advanced any further by Section 760's "affirmative authorization" requirement. As the court explained, "[t]he constitutionally acceptable opt-out alternative . . . reveals that protection of dissenters' rights can be achieved

through means significantly less restrictive of the union's associational freedoms than RCW 42.17.760's opt-in requirement." *Id.* at 33a. For this reason the court appropriately held that Section 760 was not narrowly tailored to advance the state's legitimate interests, and therefore was unconstitutional. *Id.* at 33a-34a.

B. Not only was the Washington Supreme Court correct in invalidating the Washington state statute at issue here, but for present purposes it is equally to the point that the Washington court's decision raises no question of general significance.

The federal government and the great majority of the states regulate union and corporate political contributions and expenditures in various ways and to various degrees. But neither the federal government nor any other state has ever imposed a regulation on union (or corporate) political advocacy comparable in its purpose and effect to Washington's Section 760.[8] Section 760 is indeed unique among state and

---

[8] Nowhere in their papers do petitioners identify any comparable statute from another state, and our research has disclosed none. The *Davenport* petitioners do cite statutes from Maryland and Montana which they say "prohibit the use of nonmember fees on political activities or contributions." *Davenport* Pet. at 9 n.8 (citing Md. Code Ann., Educ. § 6-504(d)(3)(iv)(2); Mont. Code Ann. §§ 39-31-402(3); 39-32-109(2)(d)).

But the Maryland statute (which applies only to noncertificated education employees in Baltimore County)—like agency fee statutes in several other states—limits the agency fee a union may collect to the portion of union dues that corresponds to the union's constitutionally "chargeable" expenditures (thus excluding political expenditures). *See* Md. Code Ann., Educ. § 6-504(d)(3)(iv)(1). In contrast to Section 760, therefore, the Maryland statute does not restrict a union's political expenditures financed from dues and fees it has lawfully collected.

The Montana statutes make it an unfair labor practice for a union to "use agency shop fees for *contributions to political candidates or parties*." Mont. Code Ann. § 39-31-402(3) (emphasis added). In contrast to Section 760, the Montana statutes do not reach a union's right to make

federal efforts to regulate union political expenditures in this manner.

And, as we have also noted, the Washington Supreme Court limited itself to determining the constitutional validity of the State of Washington's unique regulation through Section 760 of union political advocacy. The Washington court's decision invalidating Section 760 has no direct application to any federal, or to any other state, regulation of union (or corporate) political advocacy on the books. Nor, given its focus on the unique nature of Section 760, does the decision below so much as throw a cross light on the validity of any such federal or state regulation of union (or corporate) political advocacy. It is not, in short, a decision that warrants review by this Court.

II.

As we have stressed, the issue posed by Section 760 and decided by the Washington Supreme Court is whether the State of Washington impermissibly burdened the First Amendment right of unions like WEA to engage in political advocacy financed out of a general fund consisting primarily of members' dues moneys and secondarily of agency fee moneys, by requiring the union to secure the affirmative consent to engage in such advocacy of every one of the individuals who pays an agency fee. None of the decisions cited in the certiorari petitions as being in conflict with the Washington Supreme Court's decision treat with an election campaign practices regulation in any way comparable to the Washington state regulation at issue. And, not surprisingly, none of those decisions, in passing on the validity of the

---

independent political expenditures, to make contributions in support of or in opposition to ballot propositions, or to engage in internal communications with its members. And, as we discuss below, Section 760's great breadth of application is of critical importance in assessing the statute's constitutionality.

regulations there at issue, does or states anything contrary to the Washington court's decision here.

The cases on which the petitioners rely for their assertion of a conflict fall into several distinct groups, which we address in turn.

A. ***Agency Fee Cases.*** First and foremost, both sets of petitioners rely on *Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). *Washington* Pet. at 17-20; *Davenport* Pet. at 17-20; *see also id.* at 18 n.15 (citing similar state cases). As petitioners say, *Lincoln Federal* stands for the proposition that a union has no constitutional right to collect an agency fee in the first place. That rule of law is as undisputed as it is irrelevant to this case. The issue here is not the right of unions to *collect* an agency fee from nonmembers; that right is established by Washington statutory law and is undisputed. Rather, the issue is the union's right to engage in political expression financed out of the member dues and agency fees the union has lawfully collected. Nothing in *Lincoln Federal* so much as speaks to that question.

B. ***Dues Checkoff Cases.*** The second line of cases on which petitioners rely—those typified by *South Carolina Education Association v. Campbell*, 883 F.2d 1251 (4th Cir. 1989), that address the constitutionality of statutes limiting or prohibiting the use of payroll deduction for the collection of union dues and agency fees—has even less relevance to the matter at hand. These cases hold, as petitioner Washington puts it, "that the First Amendment does not impose any obligation on government to assist unions in collecting union dues or agency shop fees by granting payroll deductions so that the fees and dues can be withheld from employees' pay by the employer and paid directly to the union." *Washington* Pet. at 19 n.4 (citing cases); *see also Davenport* Pet. at 11-13 (citing cases). The dues checkoff cases, in short, address the constitutionality of limits placed on unions' ability to demand

assistance from public employers in collecting their dues and fees. These cases have nothing to say, directly or by implication, on the constitutionality of limits placed on how a union expends its own funds, which it has lawfully collected.

Petitioners rely particularly in this regard on *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), in which a divided panel of the Sixth Circuit upheld a state's requirement of annual affirmative authorization of *payroll deductions* for state employee/union members' contributions to their union's political committee. *Washington* Pet. at 25-27; *Davenport* Pet. at 20-25. *Miller*—like the other payroll deduction cases discussed above—thus upheld a limitation on a union's ability to use the *state's payroll services* to assist it in collecting moneys from its members. That is an altogether different matter than the restriction at issue here on the union's political expression financed by moneys that are already, lawfully, in its treasury. As the Washington Supreme Court observed, in responding to the dissent's reliance on *Miller*, Washington law does indeed have a provision like the Michigan statute that the Sixth Circuit upheld, but it is not Section 760:

> [T]he statute at issue in *Miller* is not similar to § 760. Washington's counterpart to the Michigan statute at issue in *Miller* is RCW 42.17.680(3) .... Like the Michigan statute at issue in *Miller*, RCW 42.17.680(3) restricts the ability of various groups, including corporations and labor groups, from making direct deductions from an employee's wages. *Miller* did not involve a statute like § 760, and *Miller* is inapplicable to this case.

Pet. App. 25a.[9]

---

[9] Prior to 2002, Wash. Rev. Code § 42.17.680(3) required that employees give annual authorization for payroll deductions made ... political committees or otherwise designated for political contributions. As amended in that year, Section 680(3) now provides as follows:

C. ***Collective Bargaining Cases.*** Petitioners also invoke the cases holding that a state is not constitutionally required to recognize or to engage in collective bargaining with a union as the representative of its employees. *Washington* Pet. at 19 (citing *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463 (1979)); *Davenport* Pet. at 13-17. But those cases address the extent to which the Constitution requires government to take some affirmative action to cooperate with a union's representational efforts and activities, an issue that is far afield from the issue here—the extent to which government may restrict a union's right to engage in political expression. And in deciding the former issue, the *Smith* line of cases says nothing that bears on the issue here.

D. ***United States v. Boyle.*** The *Washington* petition also asserts the existence of a conflict between the decision below and the D.C. Circuit's 1973 opinion in *United States v. Boyle*, 482 F.2d 755 (D.C. Cir. 1973). *See Washington* Pet. at 23-25. There is no such conflict. *Boyle* was a prosecution of a union officer for making contributions to political candidates from union treasury funds in violation of a federal statute, 18 U.S.C. § 610 (1970), that prohibited the making of such contributions out of union or corporate funds. The *Boyle*

> No employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries may withhold or divert a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee. The request must be made on a form prescribed by the [PDC] .... The employee may revoke the request at any time. At least annually, the employee shall be notified about the right to revoke the request.

In *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 999 P.2d 602, 612-16 (Wash. 2000), the Washington Supreme Court construed Section 680(3) as applying only to payroll deductions made to or designated for a political committee or candidate, holding that it did not restrict a union's use for political purposes of funds from its general treasury.

court rejected the defendant's challenge to the constitutionality of the statute's prohibition on such contributions.

Petitioner would have it that *Boyle* stands for the proposition that any and all federal and state limitations on political contributions or expenditures financed by union or corporate treasury money are constitutional. That is a plain misreading of *Boyle*. Since its seminal decision three years after *Boyle* in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court has consistently drawn a distinction between the regulation of political contributions and political expenditures, applying strict scrutiny to the latter but not the former. And the Court has also applied a different standard to statutes restricting contributions in support of or in opposition to ballot propositions than to statutes limiting contributions to political candidates. *First National Bank v. Bellotti*, 435 U.S. 765 (1978). Thus, nothing in *Boyle*, a case involving contributions to political candidates, cuts against the Washington Supreme Court's "strict scrutiny" conclusion that Section 760—which reaches union contributions with respect to ballot propositions, as well as union political expenditures (including even expenditures for a union's internal political communications with its members), but does not reach corporate political expenditures and is not narrowly tailored to any compelling state interest—is constitutionally invalid.

E. ***Federal Election Law Cases.*** Finally, both sets of petitioners assert that the decision below is inconsistent with this Court's jurisprudence under the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 441b. *See Washington* Pet. at 20-23; *Davenport* Pet. at 25-30.

Insofar as the assertion is that the Court's FECA decisions provide support for the conclusion that Section 760 is constitutional, it is unavailing. FECA does strictly regulate contributions to political candidates and certain political expenditures financed by union (or corporate) treasury money. But in light of the constitutional interests involved, FECA

does not go so far as to reach contributions and expenditures with respect to ballot initiatives and referenda, and it *expressly permits* "communications by . . . a labor organization to its members and their families on any subject" (as well as similar corporate communications) and the "establishment" and "administration" of union (and corporate) political committees, notwithstanding that such expenditures are financed by treasury money. 2 U.S.C. § 441b(b)(2)(A), (C). In contrast, Section 760 bans all union (but not corporate) political contributions and expenditures financed by union treasury money—including contributions and expenditures in support of or in opposition to ballot propositions, as well as expenditures for internal political communications with the union's members and for administration of the union's political committee—unless each individual who pays agency fees into the union treasury affirmatively consents to the union's making of such contributions or expenditures.

Given the federal statutory context, in passing on the constitutionality of FECA's regulation of union and corporate political advocacy financed by treasury money, this Court has never had occasion to opine on the validity of a statutory limitation that reaches as far as does Section 760, that does so on a one-sided basis affecting only unions, and that is not narrowly tailored to any compelling governmental interest. And, not surprisingly, nothing the Court has said or done in its FECA decisions so much as suggests that a provision like Section 760 would pass constitutional muster.

To the contrary, it has been a constant in this Court's FECA cases, beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976), that all restrictions on political *expenditures* require strict scrutiny and must be "narrowly tailored to serve a compelling governmental interest." *FEC v. Beaumont*, 539 U.S. 146, 162 (2003); *see also, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251-52 (1986). The *Washington* petitioners' heavy reliance on *FEC v. National Right*

to Work Committee, 459 U.S. 197 (1982), *see Washington* Pet. at 20-23, is inapt for this reason. That case involved only a limitation on *contributions to political candidates*—which are not subject to strict scrutiny analysis but only to the requirement that the regulation be "'closely drawn' to match a 'sufficiently important interest.'" *Beaumont*, 539 U.S. at 162 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000)). This Court has repeatedly noted this point in distinguishing *National Right to Work* from cases involving political *expenditures*. *Massachusetts Citizens for Life*, 479 U.S. at 259; *Beaumont*, 539 U.S. at 162.[10]

Indeed, even to the extent Section 760 applies to political *contributions*, it goes far beyond FECA and is subject to strict scrutiny. Unlike FECA, *see* 2 U.S.C. § 441b(a), Section 760 is not limited to political contributions to candidates for public office, but extends to contributions (as well as expenditures) made in support of or in opposition to ballot initiatives and referenda—which is the only kind of political contribution that is at issue here. *See supra* note 5. Such restrictions on political expression are subject to strict scrutiny, and are not supported by the justifications that allow restrictions—like those imposed by FECA—on contributions to political candidates. *First National Bank v. Bellotti*, 435 U.S. 765 (1978).

The heart of the matter here—and the essence of what distinguishes this case from those on which petitioners rely—is that, as the Washington Supreme Court's decision demonstrates, *see supra* Part I.A, Section 760's unique restrictions on union political expenditures cannot withstand the strict scrutiny that the Constitution requires.

---

[10] The issue actually decided in *National Right to Work* was, moreover, an exceedingly narrow one, involving the scope and constitutionality of FECA's limitation, to "members" of the corporation, of a corporation's right to solicit contributions to a separate segregated fund. That question has no application to the instant case.

Petitioners' assertion of a conflict between the decision below and this Court's FECA cases thus is misplaced. The Washington Supreme Court's judgment striking down Section 760 in no way threatens any provision of FECA, and is not in conflict with any decision construing that statute.

CONCLUSION

The Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

JUDITH A. LONNQUIST
1218 Third Avenue, Suite 1500
Seattle, WA 98101
(206) 447-9186

HARRIET STRASBERG
3136 Maringo SE
Olympia, WA 98501
(360) 754-0304

JOHN M. WEST
(*Counsel of Record*)
LAURENCE GOLD
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

Counsel for Respondents

August 2006

FILED
AUG 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 05-1589

IN THE

Supreme Court of the United States

GARY DAVENPORT, MARTHA LOFGREN,
WALT PIERSON, SUSANNAH SIMPSON,
AND
TRACY WOLCOTT,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITIONERS' REPLY BRIEF

*MILTON L. CHAPPELL
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 321-8510

STEVEN T. O'BAN
Ellis, Li, & McKinstry PLLC
Two Union Square
601 Union St., Suite 4900
Seattle, WA 98101-3906
(206) 682-0565

Counsel for Petitioners
**Counsel of Record*

August 2006

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Opposition Brief Totally Ignores the Real Section 760 and, Thus, Provides No Arguments Against Granting the Petitions 1

II. The "Opt-in" Requirements of § 760 Do Not Burden the Union's Associational Rights and Are, in Fact, Narrowly Tailored to Support the State's Compelling Interest 4

III. The Washington Supreme Court's Decision Directly Conflicts with the Decisions and Statutes Petitioners and Amici Cite 7

IV. The State Has a Compelling Governmental Interest to Further Protect the Rights of Nonmembers Not to Support Union Politics 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases ***Page***

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 7

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 7, 10

Buckley v. Valeo,
424 U.S. 1 (1976) 8, 10

FEC v. National Education Association,
457 F. Supp. 1102 (D.D.C. 1978) 9

Machinists v. Street,
367 U.S. 740 (1961) 5, 6

Michigan State AFL-CIO v. Miller,
103 F.3d 1240 (6th Cir. 1997) 6

Pipefitters Local 562 v. United States,
407 U.S. 385 (1972) 9

Railway Clerks v. Allen,
373 U.S. 113 (1963) 5

State ex rel. Evergreen Freedom Foundation v. Washington Education Association,
999 P.2d 602 (2000) 3

United Public Workers of America (CIO) v. Mitchell,
330 U.S. 75 (1947) 7

TABLE OF AUTHORITIES - CONT.

Constitutions, Statutes, and Rules ***Page***

United States Constitution,
Amendment I 1, 4, 7, 9

Federal Election Campaign Act of 1971,
2 U.S.C. § 431 ..... 8, 10

Hatch Act,
5 U.S.C § 7324 ..... 7, 10

Washington Fair Campaign Practices Act, § 760,
RCW § 42.17.760 ..... *passim*

Others Authorities

Website of the Washington Public
Disclosure Commission
http://www.pdc.wa.gov/servlet/ContServlet 5

ARGUMENT

I. THE OPPOSITION BRIEF TOTALLY IGNORES THE REAL SECTION 760 AND, THUS, PROVIDES NO ARGUMENTS AGAINST GRANTING THE PETITIONS.

The Brief in Opposition ("Opposition" or "Opp.") of the Respondent Washington Education Association ("WEA") is based on two related fallacies: 1) that Wash. Rev. Code § 42.17.760 ("§ 760") is so broad that it bans **all** union political contributions and expenditures from a union's general treasury, including the **dues of union members**, unless **every nonmember** who pays agency fees into the general fund affirmatively consents to the union's making such contributions or expenditures; and 2) that this "unique draconian restriction," Opp. at 9, is so *sui generis* that the Washington Supreme Court's decision invalidating § 760 has no direct application to, nor threatens, any other federal or state statute regulating union political advocacy or any decision construing other such statutes and regulations.[1]

Seeking to "justify" the Washington Supreme Court's implausible 6-3 decision, which "turns the First Amendment on its head," Pet. App. at 30a (Sanders, J., dissenting), WEA turns § 760 into a monster, thereby creating the ultimate "Straw Man." Section 760 actually states:

---

[1]Part of this second fallacy, that "the State of Washington *alone*," Opp. at i & 9, *accord id.* at 8-9, 11-12, 18-19, has an "opt-in" restriction on the use of union members' dues for politics, is aptly refuted by the excellent Brief *Amicus Curiae* of the Campaign Legal Center Supporting [the State] Petitioner filed in No. 05-1657 ("CLC Amicus Brief"), which discusses the federal "opt-in" statute and at least fourteen state "opt-in" laws restricting union political activities that are in many cases more restrictive of union political activities than the real § 760.

> A labor organization may not use **agency shop fees** paid by an **individual who is not a member** of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized **by the individual**.

Opp. at 4 (emphasis added).

Although quoting the text of § 760 in the Opposition, WEA always describes § 760 in a disingenuous, false way, even injecting this untruthfulness into the Question Presented.[2] WEA does so because it knows that the plain meaning and effect of § 760 easily passes constitutional muster. It attempts to mislead the Court in hopes that the Court will be duped into denying the Petitions.

Section 760 only applies to nonmembers' compelled agency fees, yet WEA falsely describes § 760 as applying to union members' voluntary dues. Moreover, § 760 only requires the unions to get the affirmative authorization of an

---

[2]Here are some of the falsehoods on which the Opposition is built: "[T]hrough Section 760 the State of Washington *alone* * * * make[s] it unlawful for a union to finance what would otherwise be lawful political advocacy out of a **general fund** made up primarily of its **members' dues** and secondarily of [non-members'] agency fee moneys – unless the union has secured the affirmative consent of **each individual payer of an agency fee** to the financing of the union's political advocacy through the union's treasury.

* * * *

"In practical terms, Section 760 would **silence the political advocacy** of the unions like WEA that finance their advocacy out of general funds that consist overwhelmingly of **members' dues money**, by creating the 'insurmountable . . . hurdle[],' Pet. App. 1[6]a, of securing the affirmative consent to engage in such advocacy of **each and every [nonmember]** who pays an agency fee into the union's general fund." Opp. at 9 (italics emphasis in original, bolded emphasis added), *accord id.* at i (Question Presented), 12, 17.

individual nonmember in order to use **that** nonmember's compulsory fees "to make contributions or expenditures to influence an election or to operate a political committee" ("§ 760 politics"). *Id.* Nevertheless, WEA misleadingly states that § 760 "bans **all union** * * * political contributions and expenditures" and political advocacy, "unless **each individual who** pays agency fees * * * affirmatively consents to the union's making of such contributions or expenditures." Opp. at 17 (emphasis added); *see also id.* at 13 ("issue is the union's right to engage in political expression financed out of the member dues and agency fees").

Nothing is further from the truth, and there is nothing in the record to suggest such a "great breadth of application," *id.* at 12 n.8, of § 760 by the State of Washington. Neither the Washington Court of Appeals nor the Supreme Court ever suggested, much less found, that § 760 impaired the use of member dues for politics. In fact, the Washington Supreme Court had specifically held six years earlier that Initiative 134, the Fair Campaign Practices Act, of which § 760 is a part, places no restrictions on the use of union member dues in politics. *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 999 P.2d 602, 605, 616 (2000). "There is **no statutory prohibition** against a labor organization using general treasury funds **obtained from members' dues** for [§ 760 politics]." *Id.* at 616 (emphasis added).

The successful party securing this green light for using union member dues in Washington politics was Respondent WEA, and it twice cited this case in the Opposition at 9 & n.7, and at 15 n.9. It even correctly admitted that the case held that Initiative 134 "did not restrict a union's use for political purposes of funds from its general treasury." *Id.* at 15 n.9.

An examination of § 760's text reveals a limited "time and place" restriction on union political activities that does not directly affect the union and its members. The Opposition at 8, 9-10, 11-12, 18-19, repeatedly commends the Washington Supreme Court for protecting the union and its members' First Amendment rights of association by striking down § 760. However, it is inconsistent to argue that a statute that only deals with nonmembers of a union violates the First Amendment rights of union members.[3] What is remarkable and unprecedented is that the majority thought it a violation of the union members' rights for the union to have to ask the nonmember's permission before it could take and use his or her money for § 760 politics.

II. THE "OPT-IN" REQUIREMENTS OF § 760 DO NOT BURDEN THE UNION'S ASSOCIATIONAL RIGHTS AND ARE, IN FACT, NARROWLY TAILORED TO SUPPORT THE STATE'S COMPELLING INTEREST.

The issue here is not "the union's right to engage in political expression financed out of the member dues and [all] agency fees." Opp. at 13. On its face, and as definitively construed by the state courts in this case, the section only places restrictions on the political use of the monies of nonmembers who do not affirmatively consent, not the monies

---

[3]The real § 760 cannot cut "deeply," Opp. at 9, into WEA's First Amendment associational rights because it only applies to nonmembers' compulsory agency fees, which make up less than five per cent of the revenue for the union's general fund. *Id.* at 4. This case is really about the money coerced from nonmembers that is used for the unions' favorite political advocacy.

of members or consenting nonmembers. *See, e.g.*, Pet. App. at 1a, 7a, 9a, 15a-16a, 23a, 25a-27a.[4]

The only "hurdle" that the statute imposes is a slight administrative one, *i.e.*, that the union must make "individual contact with each nonmember," *id.* at 17a, to get the nonmember's affirmative consent to use **his** or **her** fees for politics. That is hardly an "insurmountable . . . hurdle."[5] Indeed, as the nonmember Petitioners point out, that burden can easily be

---

[4]The trial court's injunctive remedy, State App. at 84a-91a, is consistent with this interpretation of the statute. It does not enjoin the collection or spending of dues from union members or consenting nonmembers. It does not enjoin the union from making any political contributions and expenditures financed by union treasury money at all. It merely enjoins collection of the § 760 political portion of nonmembers' agency fees absent consent.

"For WEA fiscal year 2003-2004, and every fiscal year thereafter, WEA shall reduce the agency fees chargeable to [nonmember] agency fee payers [who have not affirmatively authorized * * * the use of their fees for § 760 politics] from an amount equivalent to 100 percent of the member dues by (i) the percentage of the WEA's total expenditures that are analyzed to have been used for § 760 expenses in [a prior] fiscal year ***, (ii) plus a cushion of 3 percent." *Id.* at 88a-89a.

This remedy is similar to the remedy suggested by this Court in *Machinists v. Street*, 367 U.S. 740, 774-75 (1961) and *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), albeit for objectors in a union shop. "Such a decree would order (1) the refund to him of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion." *Allen*, 373 U.S. at 122.

[5]Neither the injunction of December 3, 2001, nor the supposedly "insurmountable . . . hurdle" of § 760, has prevented WEA from spending more than $2,042,979.19 of union member dues on § 760 politics during the past five years. *See* http://www.pdc.wa.gov/servlet/ContServlet, the "in kind contributions" database maintained by the Washington Public Disclosure Commission. This fact alone explodes WEA's exaggeration that "Section 760's unique restrictions on union political expenditures cannot withstand the strict scrutiny that the Constitution requires." Opp. at 18.

met by putting a box for nonmembers to consent in the *Hudson* packet that the WEA already annually sends all nonmembers. Pet. at 23-24. What could be easier and less of a hurdle? Who, trying to obtain money from another, would consider it a burden to have to actually ask for the money?

Forty-five years ago, this Court rejected the flawed reasoning used by the WEA and the Washington Supreme Court majority to strike down § 760, *i.e.*, that it "significantly burdens the union's right of expressive association" by "doubl[ing] the complexity of the dues collection system" and "impos[ing] further administrative burden." Pet. App. at 27a; *see also* Opp. at 8. This Court found that a remedy similar to the § 760 remedy adopted by the trial court here, *see supra* note 4, protects both the "majority and dissenting interests in the area of political expression * * * to the maximum extent possible without undue impingement of one on the other * * * with a minimum of administrative difficulty and with little danger of encroachment on the legitimate activities or necessary functions of the unions." *Machinists v. Street*, 367 U.S. 740, 773, 774 (1961) (footnote omitted).

If the remedy § 760 requires does not directly impinge on the political interests of the union member majority and imposes only a minimum of administrative burden, *i.e.*, that the union ask the nonmember for permission to use his or her agency fees for § 760 politics, then the "opt-in" requirements of § 760 do not burden, much less significantly burden, the union's right of expressive association. This remedy is, in fact, narrowly tailored to support the State's compelling interest in protecting nonmembers' rights and their voluntary participation in politics, as the Sixth Circuit held when considering a similar, but more restrictive, statute involving union members in *Michigan State AFL-CIO v. Miller*, 103

F.3d 1240, 1253 (6th Cir. 1997). *See* Pet. at 20-25. Yet the Washington Supreme Court found that the common courtesy of asking permission violates the First Amendment!

III. THE WASHINGTON SUPREME COURT'S DECISION DIRECTLY CONFLICTS WITH THE DECISIONS AND STATUTES PETITIONERS AND AMICI CITE.

Contrary to WEA's argument, Opp. at 11 n.8, the real § 760 is less restrictive than the Maryland, Montana, New Mexico and Pennsylvania statutes discussed in the Petition at 9-10 n.8, because it restricts only the use of nonconsenting nonmembers' monies, not all nonmembers' compelled fees. If the Washington Supreme Court's invalidation of § 760, the less restrictive campaign finance law, is left standing, those four more restrictive laws along with the other statutes identified in the Petition at 9-10 nn.8-9, at 28 n.22, and the CLC Amicus Brief at 12-13 & n.4, will be called into question.[6]

The issue here is not the union's "own funds, which it has lawfully collected." Opp. at 14; *accord id.* at 10, 13-15. If that were the case, this Court in *Abood v. Detroit Board of Education*, 431 U.S. 209, 234, 235-36 (1977), would not have held that a union cannot use objectors' fees for politics, because unions in Michigan, unlike unions in Washington under § 760, could lawfully collect fees equal to full dues, and spend them for politics, under the statute at issue in *Abood*, *id.* at 232.

---

[6]The fact that this Court has upheld the far more restrictive Hatch Act, 5 U.S.C. § 7324, and state "little Hatch Acts," against claims that they violate the political rights of union members and others, *see Broadrick v. Oklahoma*, 413 U.S. 601, 606 (1973); *United Pub. Workers of Am. (CIO) v. Mitchell*, 330 U.S. 75, 99-103 (1947), supports granting the Petitions and striking down the Washington Supreme Court's decision.

The issue here is whether a state may place conditions on the use of nonmember fees that unions have only a statutory right to collect, and the collection of which the state could refuse to authorize entirely. *See* Pet. App. at 30a-32a (Sander, J., dissenting).

IV. THE STATE HAS A COMPELLING GOVERNMENTAL INTEREST TO FURTHER PROTECT THE RIGHTS OF NONMEMBERS NOT TO SUPPORT UNION POLITICS.

The state has a valid governmental interest in limiting § 760 to "only unions," Opp. at 17, *accord id.* at i (Question Presented), 9, 16, because only unions have a statutory privilege of collecting compulsory fees from nonmembers as a condition of employment. Corporations have no such compulsory power.

Under any standard used to judge campaign finance laws, see Opp. at 17-18, the State of Washington certainly has a compelling state interest to make sure that the collective bargaining fees nonmembers are compelled by state statute to pay are not involuntarily used by the union for political contributions or expenditures. In other words, the State, like the Federal Government through the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, has a compelling interest to require that political contributions from nonmembers of a union be knowing and voluntary. As one court put it in a case involving union members:

> The same interest advanced by [this Court in] *Buckley* [*v. Valeo*, 424 U.S. 1 (1976) (per curiam)] is also served by ensuring that every dollar in that political action fund is knowingly and intentionally given. To achieve that, the burden must be on the

> solicitor and not the [union member] dissenter. This limitation on the union's First Amendment rights is certainly far less severe than the amount of contribution limitation validated in *Buckley*.

FEC v. National Educ. Ass'n, 457 F. Supp. 1102, 1109 (D.D.C. 1978) ("*FEC*").

Moreover, this Court in *Pipefitters Local 562 v. United States*, 407 U.S. 385, 439 (1972), interpreted a federal statute dealing with the solicitation of political contributions from union members to require "knowing free-choice donations." "'Knowing free-choice' means an act intentionally taken [opt in] and not the result of inaction when confronted with an obstacle [opt out]." *FEC*, 457 F. Supp. at 1109. An "opt-out" procedure "results in some unknowing, and therefore, involuntary, contributions." *Id.* at 1107. Only an "opt-in" procedure, as § 760 requires, guarantees voluntary and knowing political contributions by compelled agency fee payers.

Unlike voluntary members, there is no basis in fact or logic to believe that all nonmembers voluntarily and knowingly consent to have the union use some of their compulsory fees for § 760 politics in accordance with the views and wishes of union officials and/or union members, unless they affirmatively object.[7] That nonmembers have chosen not to join the union, and support it financially only because of state compulsion, by definition, dispels any belief that they voluntarily and knowingly consent to § 760 political use of their forced fees.

---

[7]Even among members, one court found that "something other than a willingness by the member to be associated with the union's political activities operates to make [the opt-out] so advantageous to the union's funding mechanism." *FEC*, 457 F. Supp. at 1108.

Thus, like the sections of the FECA this Court upheld in *Buckley* and later decisions, § 760's simple requirement that the union secure the affirmative authorization of its nonmembers before using their compulsory fees on § 760 politics "safeguard[s] the integrity of the electoral process," does not directly interfere with protected political expression, and does not perceptibly reduce "the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 421 U.S. at 58.[8]

CONCLUSION

Because the Opposition totally ignores the **real** § 760, it provides no meaningful arguments against the Petitions for Certiorari. Accordingly, for the reasons stated here, in the Petitions, and the various Amicus Briefs in Support of the State's Petition, the Petitions in Nos. 05-1589 and 05-1657 should be granted, the cases consolidated, and the decision below summarily reversed; or the case set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

MILTON L. CHAPPELL*
STEVEN T. O'BAN
COUNSEL FOR PETITIONERS
*Counsel of Record

August 23, 2006

---

[8]The valid and important state interests that support the far more restrictive Hatch Act and state "little Hatch Acts" also support § 760. These include "attracting greater numbers of qualified people [to public employment] by insuring their job security, free from the vicissitudes of the elective process and by protecting them from 'political extortion.'" *Broadrick*, 413 U.S. at 606.

FILED
NOV 8 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(17) (25)

NOS. 05-1589, 05-1657

IN THE SUPREME COURT OF THE UNITED STATES

GARY DAVENPORT, ET AL.,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF WASHINGTON

JOINT APPENDIX

Milton L. Chappell*
National Right To Work Legal
Defense Foundation, Inc.
80001 Braddock Road Suite 600
Springfield, VA 22160
703-321-8510
Counsel For Petitioners
Davenport, et al.

John M. West*
Bredhoff & Kaiser, PLLC
805 15th Street NW Suite 1000
Washington, D.C. 20005
202-842-2600
Counsel For Respondent Washington
Education Association

Rob McKenna
Attorney General
William Berggren Collins*
Deputy Solicitor General
1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245
Counsel For Petitioner
Washington

Counsel Of Record

PETITION FOR CERTIORARI FILED JUNE 13, 2006 / JUNE 14, 2006
CERTIORARI GRANTED SEPTEMBER 26, 2006

TABLE OF CONTENTS

Davenport v. WEA
No. 05-1589

Relevant Docket Entries 1

Amended Class Action Complaint (10-12-01) 3

Attachment: Stipulation Of Facts, Violations And Recommendations (9-25-00) 13

Attachment: Thurston County Superior Court Letter Opinion (7-31-01) 15

Declaration of Aimee S. Iverson (10-25-01) 25

Ex. A: 2000-01 WEA Membership Enrollment Guide 26

Declaration of Milton L. Chappell (10-31-01) 46

Ex. A: WEA Response To Interrogatory No. 6 47

Declaration Of Judith Lonnquist (11-01-01) 48

Deposition Transcripts

Gary Davenport 49

Martha Lofgren 54

Susanna Simpson 61

Washington v. WEA
No. 05-1657

Relevant Docket Entries 71

Complaint for Violation Of RCW 41.27.760 (10-9-00), with Attachment, Stipulation Of Facts, Violations And Recommendations (9-25-00) 76

Defendant's Amended Answer And Affirmative Defenses (2-23-01) 82

Plaintiff's Supplemental Trial Brief (5-12-01) 87

Trial Transcripts

- Thomas Hedges 91
- Thomas Baier 101
- Kathryn O'Toole 113
- James S. Seibert 115
- Jeffrey L. Baliban 126
- Lee Ann Preilipp 139
- Kristeen Hanselmann 143
- Thomas Hedges 155
- Vickie Rippie 157
- Michael E. Gocke 160
- James S. Seibert 173
- Laird Vanetta 174

Hearing On Injunction 11/15/01 189

Trial Ex. 156: WEA Revenues And Expenditures 1996–2000 (chart) 192

Trial Ex. 41: Hudson Packet Documents

Memo From Seibert To Certificated And AHE Agency Fee Payers (9-15-00) 194

App. C: List Of Chargeable And Nonchargeable Activities..... 203

App. F: Auditor's Report From Tremper & Co. To Seibert (8-1-00)..... 206

Permanent Injunction (12-3-01) including Exhibit 1 208

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the respective printed Petitions For Certiorari:

Davenport v. WEA
No. 05-1589

Washington ex rel. Washington State Public Disclosure Commission v. Washington Education Association
156 Wash. 2d 543, 130 P.3d 352 (2006) 1a

Davenport v. Washington Education Association
117 Wash. App. 1035, 2003 WL 21465479 (2003) (unpublished) 42a

Davenport Consolidated Order On Pending Motions, Thurston County Superior Court (1-18-02) 45a

Washington v. WEA
No. 05-1657

Washington ex rel. Washington State Public Disclosure Commission v. Washington Education Association
156 Wash. 2d 543, 130 P.3d 352 (2006) 1a

Washington ex rel. Washington State Public Disclosure Commission v. Washington Education Association
117 Wash. App. 625, 71 P.3d 244 (2003) 48a

Order Granting Stay Of Injunction (7-24-03) 79a

Judgment (12-3-01) 81a

Findings of Fact and Conclusions of Law (12-3-01) 92a

Letter Opinion (7-31-01) 102a

Order Regarding Cross-Motions for Summary Judgment (5-10-01) 115a

Order of Referral to the Washington State Attorney General's Office (9-26-00) 119a

RELEVANT DOCKET ENTRIES

Davenport v. WEA

THURSTON COUNTY SUPERIOR COURT
No. 01-2-00519-4

March 19, 2001 Complaint [Doc. #5]

July 27, 2001 Motion to Dismiss [Doc. #37]

October 12, 2001 Amended Complaint Class Action [Doc. #67]

October 15, 2001 Order Granting Leave to Amend [Doc. #67.1]

October 16, 2001 Motion for Class Certification [Doc. #69]

November 30, 2001 Defendant's Motion to Stay Proceedings [Doc. #84]

December 7, 2001 Order re Dismissal [Doc. #93]

January 18, 2002 Order for Stay of Proceedings [Doc. #104]

January 18, 2002 Consolidated Order [on all Pending] Motion[s]

January 29, 2002 Notice of Discretionary Review to Court of Appeal [Doc. #105]

February 5, 2002 Motion to Continue Stay [Doc. #107]

February 15, 2002 Order of Continuance of Stay [Doc. #113]

WASHINGTON COURT OF APPEALS
No. 28375-1-II

February 19, 2002 Motion for Discretionary Review

March 28, 2002 Decision Granting Review and Denying Consolidation

January 15, 2003 Decision Linking Appeal For Argument With No. 28264-0-II

March 27, 2003 Oral Argument Hearing

June 24, 2003 Opinion - Unpublished - Reversed

July 24, 2003 Petition for Review Filed

WASHINGTON SUPREME COURT
No. 74316-9

August 8, 2003 Petition for Review [Received]

February 3, 2004 Decision on Motions - Petition for Review Granted and Consolidated With No. 74268-5

May 27, 2004 Oral Argument Hearing

March 16, 2006 Opinion

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON, SUSANNAH SIMPSON, AND TRACY WOLCOTT, Plaintiffs, individually and on behalf of all other nonmembers similarly situated vs. WASHINGTON EDUCATION ASSOCIATION, Defendant.	No. 01-2-00519-4

AMENDED COMPLAINT - CLASS ACTION

INTRODUCTION

This is a class action seeking damages to redress the violations of the class members' rights under RCW 42.17.760. Plaintiff class members are not members of Defendant Washington Education Association (WEA), but are represented by Defendant for collective bargaining purposes and pay compulsory agency shop fees to the WEA. Defendant WEA has violated Plaintiff class members' rights, willfully interfered with their paychecks, and breached its fiduciary duty by using Plaintiff class members' fees to make political contributions and expenditures without their affirmative authorization, all in violation of RCW 42.17.760.

PARTIES

1. Gary Davenport was employed in the public schools and paid an agency shop fee in an amount equal to union dues from September 1998 to March 2000 to Defendant WEA and its affiliates.

2. Martha Lofgren has been employed in the public schools and has paid an agency shop fee in an amount equal to union dues prior to and including from September 1996 to the present to Defendant WEA and its affiliates.

3. Walt Pierson has been employed in the public schools and has paid an agency shop fee in an amount equal to union dues prior to and including from September 1995 through August 2000 to Defendant WEA and its affiliates.

4. Susannah Simpson was employed in the public schools and paid an agency shop fee in an amount equal to union dues from September 1996 to December 1999 to Defendant WEA and its affiliates.

5. Tracy Wolcott has been employed in the public schools and paid an agency shop fee in an amount equal to union dues prior to and including from September 1995 to early 2000 to Defendant WEA and its affiliates.

6. Plaintiffs, who are suing on their own behalf and on behalf of all others similarly situated, are nonmembers of Defendant WEA and for the years indicated, paid mandatory agency fees in amounts equivalent to union dues, without receiving refunds, to Defendant WEA, which used their fees to influence elections and to support political committees without their authorization.

7. Defendant Washington Education Association is a labor organization representing public school employees in the State of Washington, including plaintiffs, for purposes of collective bargaining. Defendant

is a non-profit corporation organized under the laws of Washington State with its principal office is in Federal Way, Washington, and additional offices in Olympia and Spokane, Washington.

STATEMENT OF LAW

8. Pursuant to RCW 41.59.100 a public employer and labor organization may include a security provision in the collective bargaining agreement which requires agency fee payers to pay a fee equivalent to full union dues.

9. RCW 42.17.760 prohibits a labor organization from using the funds of agency fee payers for contributions or expenditures to influence an election or operate a political committee, unless affirmatively authorized by the agency fee payer. Thus, only those agency fee payers who authorize the use of their fees for the stated political purposes, or "opt-in," pay full union dues.

10. In effect, RCW 42.17.760 reduces the amount of the fee labor organizations may require of agency fee payers under RCW 41.59.100, unless they "opt-in" by affirmatively authorizing the use of their funds for elections and political committees.

CLASS ACTION ALLEGATIONS

11. This is a class action brought by Plaintiffs on their own behalf and on behalf of all other nonmembers similarly situated pursuant to CR 23. The class Plaintiffs seek to represent consists of all public school employees since September 1995 to the present and who are or were nonmembers paying an agency shop fee to Defendant WEA without receiving a reduction or refund for the amount the union spent on political contributions and expenditures, without their authorization.

12. On information and belief, the number of nonmembers in the class has ranged from 2,500 in the

1995-96 school year to 4,200 in the 2000-01 school year. On information and belief the actual number of individuals of this class is higher than 4,200 due to the retirement of nonmembers during the last five years. In 1998, Defendant WEA disclosed to the federal district court that it represented 8,789 nonmembers during the period 1994-98. These persons are therefore so numerous that individual joinder would be impracticable.

13. There are questions of law and fact common to all members of the class, such as the amount of Plaintiff class members' agency fees Defendant WEA used for contributions or expenditures to influence an election or operate a political committee; whether Plaintiff class members have the right to reimbursement for such contributions and expenditures; whether Plaintiff class members are entitled to damages for Defendant's unauthorized use of their fees for political contributions or expenditures; and the amount to be returned to Plaintiff class members.

14. Plaintiffs' individual claims are typical of other members of the Plaintiff class, who have been subject to the same deprivation of their rights through Defendant's use of their agency fees for political purposes without their authorization.

15. Plaintiffs can adequately represent the interests of other members of the class. Plaintiffs have no interest antagonistic to nonmember agency fee payers whose fees have been used for political contributions or expenditures without their consent. Plaintiffs' attorneys are experienced in representing the interests of nonmember employees in litigation, including class actions, involving similar issues.

16. Defendant WEA is prohibited under RCW 42.17.760 from collecting and expending the fees of each class member to influence an election or operate a political committee without their consent. Thus, the

prosecution of separate actions would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for the Defendant WEA.

17. The questions of law and fact common to the members of Plaintiff class predominate over any questions affecting only individual members. The important and controlling issues in this action, delineated above (paragraph 13), are common to all members of the class. Any factual distinctions among class members, if they exist, are peripheral to these core questions.

18. A class action is superior to other available methods of fair and efficient adjudication of the controversy, as the Plaintiff class members have been deprived of the same rights through the Defendant WEA's use of their agency fees for political purposes without authorization. Separate actions by individual class members to vindicate their rights are not a viable alternative due to the limited amount of money involved in any individual claim. Moreover, the large number of claimants would result in a multiplicity of actions and a substantial waste of judicial resources.

19. By making contributions and expenditures to influence elections or operate a political committee with monies collected from the Plaintiff class, without their consent, Defendant has acted on grounds generally applicable to the Plaintiff class as a whole.

STATEMENT OF FACTS

20. WEA and its affiliated labor organizations are paid dues from members, and agency fees from nonmembers, through an automatic payroll deduction system administered by public school employers. Based on instructions from the WEA, public school employers deduct dues and their equivalent in fees and pay them in monthly lump sums to an intermediary, Blue Cross of Washington or the WEA's local association affiliate, which

in turn transmits to the WEA its share. WEA deposits the monthly lump sums into its general treasury.

21. Pursuant to RCW 41.59.100 and contractual agreements between Defendant and Plaintiffs' employers, Plaintiff class members are charged mandatory agency shop fees as a condition of employment.

22. WEA expends funds from its general treasury for all of its program activities, including for contributions and expenditures to influence elections and to operate its own political action committee, WEA-PAC.

23. From year to year, WEA concedes approximately 25% of its total expenditures are for political contributions, to further its ideology, and for other expenditures that under federal constitutional law may not be charged nonmembers who timely object to supporting activities unrelated to WEA's representational functions. If a nonmember does not timely object she pays the equivalent of full union dues.

24. Under federal law, WEA is required to provide to all agency fee payers a detailed disclosure of the use made of the WEA's expenditures, verified by an independent auditor. This information is commonly known as the "Hudson Notice," named after the case *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). In WEA's annual Hudson Notice, it discloses, *inter alia*, that it uses a portion of the agency shop fee for "activities to influence an election" and "[o]peration of political committees".

25. The Hudson Notice also sets forth the following options to agency fee payers:

You have three options: (1) you may pay the full amount equal to dues paid by members; (2) you may object to use of your agency fee for nonchargeable activities but accept the Association's determination of the amount of the fee that is chargeable as is set forth in this letter; or (3) you may choose to object to the use of

your agency fee for nonchargeable activities and challenge the Association's calculation of the amounts that are chargeable and nonchargeable.

26. Defendant WEA's Hudson Notice misrepresents the legal options available to agency fee payers. Under RCW 42.17.760 an agency fee may not be used to influence an election or operate a political committee unless the nonmember specifically authorizes such use. However, WEA misleads nonmembers to believe they must object annually by an arbitrary deadline set by the WEA as a condition for receiving a reduction in the amount WEA spends to influence an election and operate a political committee.

27. On information and belief, WEA reported to the Public Disclosure Commission contributions and expenditures to influence elections and support political committees from the general treasury as follows:

1996:	$1,000,417
1997:	$275,744
1998:	$266,784
1999:	$407,776
2000:	$1,089,380

28. WEA did not obtain the affirmative authorization required by RCW 42.17.760 prior to using the agency fees of Plaintiff class members in any of these years.

29. WEA's actual political contributions and expenditures from year to year exceed its reported contributions and expenditures. For example, in 1997 the Public Disclosure Commission (PDC) brought an enforcement action against the WEA for failing to fully report its political contributions and expenditures during the 1996 election cycle. As part of a settlement, WEA

agreed to pay sanctions and reimburse public school employees $425,000.

30. On September 25, 2000, Defendant WEA, through its legal counsel, signed a Stipulation of Facts, Violations and Penalty, *In the Matter of the Enforcement Action Against the Washington Education Association*, PDC Case No. 01-002 (Public Disclosure Commission, 2000). A true and correct copy of this Stipulation is attached hereto. Therein, Defendant admitted that it had committed multiple violations of RCW 42.17.760. The PDC referred the matter to the Washington State Attorney General under RCW 42.17.395.

31. On behalf of the PDC, the Attorney General commenced an enforcement action in Thurston County Superior Court, No. 00-2-01837-9. The Attorney General sought penalties, injunctive relief and attorneys fees and costs. It did not seek the damages sustained by agency fee payers arising out of the WEA's violation of RCW 42.17.760. After a bench trial to the Honorable Gary Tabor in May 2001, Judge Tabor awarded the State $200,000 in penalties and doubled the amount to $400,000 based on the WEA's willful violation of the laws. The court indicated in its July 31, 2000 written decision that it will rule on injunctive relief and award the PDC its attorney fees and costs. (A copy of the July 31, 2000 Letter Opinion is attached)

FIRST CAUSE OF ACTION – VIOLATION OF RCW 42.17.760

32. Defendant WEA deprived Plaintiff class members of their rights secured by RCW 42.17.760 by using their agency fees for contributions and expenditures to influence elections or support political committees without their affirmative authorization. Plaintiff class members are entitled to damages and prejudgment interest in an amount to be established at trial.

SECOND CAUSE OF ACTION – CONVERSION

33. Plaintiff class members reallege paragraphs 1 through 29 as if fully set forth herein.

34. Defendant WEA willfully interfered with the paychecks of Plaintiff class members, without legal justification, and deprived them of their own funds in an amount that corresponds to Defendant WEA's contributions and expenditures to influence elections and support political committees. Plaintiff class members are entitled to damages and prejudgment interest in an amount to be established at trial.

THIRD CAUSE OF ACTION – BREACH OF FIDUCIARY DUTY

34.[sic] Plaintiff class members reallege paragraphs 1 through 29 as if fully set forth herein.

35. Defendant WEA breached its common law fiduciary duty to Plaintiff class members by misusing their funds without their authorization to influence elections and support political contributions. Plaintiff class members are entitled to damages and prejudgment interest in an amount to be established at trial.

FOURTH CAUSE OF ACTION – FRAUDULENT CONCEALMENT

36. Plaintiff class members reallege paragraphs 1 through 29 as if fully set forth herein.

37. Defendant WEA owed Plaintiff class members the affirmative duty to disclose all material facts relating to WEA's use of their agency shop fees and breached that duty. Plaintiff class members are entitled to damages and prejudgment interest in an amount to be established at trial.

PRAYER FOR RELIEF

Plaintiff class members pray for the following relief:

1. Judgment declaring that this action be maintained as a Class Action under Court Rule 23;

2. Judgment against Defendant WEA on each of the causes of action in an amount to be established at trial;

3. For an award of Plaintiff class members' attorneys fees and costs; and

4. For other relief deemed just and equitable by the court.

DATED this *26th* day of September, 2001

[Signature block omitted in printing.]

[Caption omitted in printing.]

BEFORE THE
PUBLIC DISCLOSURE COMMISSION
STATE OF WASHINGTON

STIPULATION OF FACTS, VIOLATIONS AND RECOMMENDATIONS

September 25, 2000

Case No. 01-002

The Washington Education Association (Respondent) and Public Disclosure Commission Enforcement Staff (Staff) agree to the following:

1. The Respondent is a labor organization.

2. The Respondent deposited into its general fund agency fee money from 4,194 individuals.

3. The Respondent's general fund money was used to make contributions and expenditures to influence an election and to operate a political committee.

4. The Respondent did not have affirmative authorization from agency fee payers to use their money for these purposes.

5. The Respondent contends that the number of 4,194 is over-inclusive in that it includes persons who were members of WEA and did not pay agency fees.

6. Staff contends that when Respondent submitted documents in response to a subpoena, a redacted list of 4,407 agency fee payers was presented. Names of the agency fee payers were redacted and replaced with a unique identification number for each agency fee payer. Of these, 4,407 individuals, 213 either filed objections or challenges to their funds being used for

'non-chargeable' expenditures and received a refund of the portion of their fees being used for non-chargeable purposes. The funds from the remaining 4,194 individuals were then transferred from the agency fee escrow account to WEA's general operating fund.

7. Staff were unable to determine the amount of agency fees used to make the contributions and expenditures referred to in paragraph 3 because WEA's final revenue figures for FY 2000 (September 1, 1999 through August 31, 2000) are not yet available.

Violation

Respondent and Staff agree that Respondent committed multiple violations of RCW 42.17.760.

Recommendation

Staff recommends that this matter be referred to the Office of the Attorney General for further review pursuant to RCW 42.17.395(3). Respondent does not oppose the recommend-ation by staff.

Respectfully submitted this 25th day of September, 2000.

/s/	/s/
Vicki Rippie,	Harriet Strasberg, Counsel
Executive Director PDC	WEA

[Caption omitted in printing]

THURSTON COUNTY SUPERIOR COURT

Letter Opinion

July 31, 2001

Dear Counsel:

On May 14-18th, this court presided over a trial in the above-entitled case and took the matter under advisement following closing arguments by the parties. Now, having considered the testimony presented at trial, the briefs and arguments of the parties and the applicable statutes and case authority, this court rules by way of this letter opinion.

BACKGROUND

The trial in this matter focused upon facts surrounding the collection of fees by the Washington Education Association (WEA) from non-union members called "fee payers" for a five year period (1995/1996 through 1999/2000). These "fee payers" pay fees equal to the Union Dues paid by union members[1] unless they raise an objection. Those who object receive a refund based upon a formula that accounts for the ratio of "chargeable" to "nonchargeable" expenses.[2] The Public Disclosure Commission (PDC), plaintiff in this matter, claimed that portions of these fees were used for 'political purposes" in violation of RCW 42.17.760[3], that civil penalties[4] and

---

[1] These fees do not include the amount union members pay as "Community Outreach Project" (COP) assessments. COP funds were not a part of this lawsuit.

[2] This process is called the *Hudson* process, *see Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S. Ct. 2641 (19898) and distinguishes expenses that are "chargeable" to collective bargaining purposes from those which are not.

[3] RCW 41.27.760 Agency shop fees as contributions. A labor organization may not use agency shop fees paid by an individual who

costs should be imposed by this court, and that this court should consider whether any violations that might be found were "intentional" which would allow the court to "treble" any penalties and costs.[5]

The parties had previously agreed that the WEA had committed multiple violations of RCW 42.17.760.[6] The agreement itself did not, however, specify what time period it covered. This court ruled, on March 23rd, 2001, at a pre-trial hearing, that the agreement time period would be the 1999-2000 school year and that alleged violations for the previous four years would be considered at trial. This court also ruled on summary judgment that RCW 42.17.760 is constitutional and requires an affirmative authorization from agency fee payers (as opposed to a passive failure to object) before the WEA may collect or use such fees for "political purposes".[7]

ISSUES

The court will rule on the following issues as a result of the evidence produced at trial and the positions of the parties:

1. Did the WEA *use* agency fees in fiscal (school) years 1995-96, 1996-97, 1997-98, and 1998-1999 for purposes forbidden in RCW 42.17.760?[8]

---

is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

[4] RCW 42.17.390(3)

[5] RCW 42.17.400(5)

[6] Trial Exhibit 1, dated September 25, 2000.

[7] This court ruled orally on May 4, 2001 and the written order was entered May 15, 2001.

[8] Violations for 1999-2000 have been admitted by the WEA.

2. What is the appropriate amount of civil penalty to be imposed according to RCW 42.17.390(3)?

3. Were WEA's violations "intentional" and if so should penalties and costs be increased up to a treble amount as punitive damages under RCW 42.17.400(5)?

4. What other relief, if any should this court impose?

FINDINGS

I. THE WEA HAS USED AGENCY FEES IN VIOLATION OF RCW 46.17.760

The evidence produced at trial has convinced this court that the WEA did, in fact, *use* portions of the agency shop fees they received for "political purposes" that is, ". . . to make contributions or expenditures to influence an election or to operate a political committee, . . ." as prohibited by RCW 42.17.760. While this court understands the position of the WEA to the effect that they had sufficient reserves each year to more than offset the fee payor amounts in question, and that amounts involved are quire small percentage wise (both the amounts received from agency fee payers and amounts expended for political purposes), this court disagrees with that logic. Any distinction between "collecting" and agency fee (on the revenue side) and "expending" monies for a particular purpose (on the expense side) are forever obscured when the funds collected are "commingled" into the general fund.

It is clear to this court that the WEA position was that agency fees were placed into the general fund and were spent each year as the WEA determined appropriate.[9] Moreover, the WEA has further argued

---

[9] That is, unless a agency fee-payer affirmatively objected to the use of his or her funds for purposes other than collective bargaining. It that case a portion of the fees would be returned to the fee-payer under the *Hudson* process.

that even if the agency fees could have been separated, they would come back into the general fund at the end of the year as "surplus" funds. This reasoning is erroneous. This court could cite numerous examples of the unfairness of such a position, but in the interest of time and space will note only two:

First, the logical extension of such reasoning is that the WEA would, as a result of such fees, have more money to spend than if they had not collected them. If those funds could be construed to be spent only for non-political purposes, the WEA would still, obviously, have more monies to spend from other funds for political purposes. This is a clear-cut *use* of the total funds available for the given purposes in proportion to the source of the funds. While the percentage might be small, the agency fees are nevertheless used as a part of the over-all total expenditures, some of which were for prohibited purposes.

Second, if agency fee amounts are simply held, and not spent (part of the unexpended funds which existed each year) by the end of the fiscal year, WEA's position that they then lose their character and are simple a part of the surplus that can be carried over, would obviously prompt a practice of just waiting a year and spending the money without restrictions. This flies in the face of the underlying problem that this court has previously identified – that of *collecting* fees from agency fee payers without first gaining their *affirmative* authorization to do so. There would be no incentive to do so if the court were only to consider what was *spent* in the year it was collected.

In short, the WEA violates RCW 42.17.760 when it collects agency fees and then spends them for prohibited purposes in ratio to the total agency fees and dues

collected[10] *without affirmative authorization.* While the amount spent for "political purposes" will be a component of the formula for assessing what portion of the agency fees are to be credited or returned to the agency fee payers, that amount need not be quantified for this court to rule as its initial finding that such fees are, indeed, being spent in violation of the statute. The issue of how the amount of political expenditures can be factored into a determination of the correct proportional adjustment to agency fees is best left to the "Other Court Remedies" discussion below.

II. THIS COURT ASSESSES A CIVIL PENALTY OF $200,000 AGAINST THE WEA.

Having found that the WEA violated the law as set forth in RCW 42.17.760 by using agency fees for political purposes without affirmative authorization as set forth above, the court must next address appropriate civil penalties, if any, under RCW 42.17.390(3).[11] A fine of up to $10,000 for each violation of the statute presents a broad number of options to this court. This court holds, first of all, that a civil penalty is appropriate in the present case aside from any amount of restitution or refund owed. While the WEA, during the 5 year period at issue, has collected and has had the benefit of monies it was not entitled to under the statute, this court is not addressing what, if any monies or damages any individual or group of fee payers would be entitled to.[12] Instead, this

---

[10] Again, COP assessments or dues are not included.

[11] (3) Any person who violates any of the provisions of this chapter may be subject to a civil penalty of not more than ten thousand dollars for each such violation.

[12] The court notes that this action was filed by the Office of the Attorney General of the State of Washington under RCW 42.17.400(1) and is on behalf of the State of Washington as distinguished from individual agency fee payers. No fee payer sought to intervene in this matter although several individuals did ask for permission to submit amicus pleadings, which this court denied.

court notes that a penalty amount is appropriate to preserve the integrity of our system and promote public confidence: those violating statutes will be held to answer.

This court accepts, in principle, the arguments submitted by the Plaintiff herein. First of all, there cannot be an absolute determination of the amounts involved[13] either those lost to fee payers or gained by the WEA (costs avoided by not complying with the affirmative authorization requirement). Secondly, the total number or even the identity of individuals involved cannot be determined since there were constant changes over the five-year period; nevertheless a penalty could be assessed as to each individual found to have been an agency fee payer if the court desired. Plaintiff proposed that the court consider a total of 8,000 individuals, (although the actual figure appears to be almost double that[14]), and that a penalty of $25 be assessed for each of those individuals for a total of $200,000. This court accepts that proposal as being fair to both sides under the present facts.[15]

---

[13] *See State v. WWJ Corp.* 138 Wn.2d 595, 980 P.2d 1257 (1999).

[14] Exhibit 1 acknowledges that there were 4,194 agency fee payers in 1999/2000. The WEA argues that this number was over inclusive, so that Plaintiff has reduced that number to 3,200 per year; a total of 16,000 over five years. Plaintiff then cuts that figure in half (8,000) and asks for a penalty of $25 for each. That results in the requested $200,000 figure.

[15] Even if the court were to accept Ms. Lonnquist's argument that the WEA stipulated to only 4 violations for the fiscal year 1999 (4 times each year that moneys were not segregated), 4 violations in each of 5 years would constitute 20 violations; if assessed at $10,000 each that would still total $200,000.

III. THIS COURT FINDS AN INTENTIONAL VIOLATION BY THE WEA IN FAILING TO FOLLOW THE LAW AND DOUBLES THE AMOUNT OF DAMAGES AS A PUNITIVE SANCTION. THE COURT CHOOSES NOT TO DOUBLE COSTS.

This issue has been the most difficult trial issue for this court. I have listened carefully to the testimony of the witnesses and concede that there was ambivalence and a lack of official direction as to the correct interpretation of the "affirmative authorization" language by leaders for both the WEA and the PDC. On the other hand, it is clear to this court that much of that indecision on the part of the WEA was a desire to not have to get involved in a laborious process to secure such affirmative authorizations if they didn't have to. Despite a clear communication from the Washington State Labor Council in 1997,[16] the WEA chose to take the easy road. This court will also observe that even when it became completely apparent that this obvious requirement had been ignored and the WEA stipulated to "multiple violations" in September of 2000[17] the WEA could still not bring itself to acknowledge the obvious state of affairs and attempt to mitigate and negotiate the outcome of this dispute.

The PDC clearly did not move decisively to enforce this statute either; that is unfortunate. The PDC acted only when spurred to do so by citizen complaints. Any excuses that the PDC doesn't have to make regulations to explain statute compliance procedures serve no real purpose at this trial other than to further polarize the parties. The parties here are going to be required to work together in the future to accomplish what needs to be

---

[16] Exhibit 94 at trial.

[17] Exhibit 1

done in this case; this court would hope that previous communication problems will not be repeated. The fact remains however, a violation of statute is still a violation; for example a person who is speeding down a roadway does not have the right to speed just because a police officer does not make a traffic stop when the opportunity arises. The WEA argument that if the PDC had told them what was expected, they would have immediately complied, is not compelling to this court. The WEA clearly understood the PDC position leading to this trial and certainly did not immediately agree.

RCW 42.17.400(5) gives this court the discretion to treble the amount of judgment as punitive damages.[18] For the reasons discussed above, I find that the WEA "intentionally" chose not to comply with the clear language of the statute; this court imposes a punitive sanction of $400,000 (double the $200,000 civil penalty assessed above). The court will also award the Plaintiff an appropriate amount of costs of investigation and trial, including attorney's fees (to be determined upon further information from the plaintiff and further hearings, if required). I will not, however double (or treble) these costs and fees for the reasons discussed above. The punitive civil penalty is to punish the illegal actions of the WEA and is not intended as a reward or bonus to the PDC.

---

[18] (5) In any action brought under this section, the court may award to the state all costs of investigation and trial, including a reasonable attorney's fee to be fixed by the court. If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages. . . .

IV. THIS COURT DIRECTS THE WEA TO DEVELOP PROCEDURES TO IMPLE-MENT THE AFFIRMATIVE AUTHORI-ZATION REQUIREMENTS OF RCW 41.27.760

This court must not only concern itself with the past violations of the statute but must also insure that the statute is followed in the future. During the course of trial and argument, it has been suggested by the WEA that this is an extremely difficult task and that other issues make compliance nearly impossible. The WEA argues that they cannot determine, in advance, the amounts that they will spend in a given year so that agency fee payers will not be charged the proportional amount. The PDC argues that amounts determined to be "nonchargeable" under the *Hudson* analysis don't account for other amounts that are "political". The PDC has stated that it is not seeking to have the WEA seek repeated affirmative authorizations and does not ask for a separate political fund to be set up. This court has already ruled that an affirmative authorization does not necessarily have to be in writing. These issues, and others, do appear to be substantial in number and in substance. This court does not suggest that it has a sufficient understanding of either of the parties positions to fashion a remedy of its own at this point. On the other hand, this court is convinced that a procedure can be developed to assure compliance with the statute. Consequently, the court will give the WEA a period of 90 days from today's date to report back to the court with a proposal to assure compliance.

The PDC, in the court's opinion must also bear some responsibility in this task. It must provide the WEA assistance and feedback as the procedures are contemplated. This court expects that the parties will discuss and negotiate, and that consensus will be reached on as many details as possible. If the parties cannot

agree, each side should provide suggested solutions for this court's consideration in arriving at a final procedure.

At the time of trial, the parties agreed to bifurcate the trial as to certain issues concerning specific expenditures or dollar amounts. This court is not prepared to rule at this time as to the nature of certain contested expenditures which may or may not be "political". Likewise, as previously noted, this court declines to rule on issues involving repayment or restitution amounts owed to individual fee payers.

There are no other issues, so far as the court is aware, that are ripe for this court's decision today.

CONCLUSION

This court today holds that the WEA has violated RCW 46.17.760 by using agency shop fees without affirmative authorization. The Court assesses a civil penalty of $200,000 against the WEA, finds that the violation was intentional, and doubles the penalty to $400,000 as a punitive sanction. The court also orders that appropriate costs for investigation and trial and attorney's fees be paid by the respondent; these amounts are not doubled and shall be specifically determined after further information and argument, if necessary. Finally, this court directs the WEA to develop, within 90 days, a plan to comply with the affirmative authorization requirements of the statute in the future. Because the Petitioner is the prevailing party, the PDC is directed to prepare and present an order for filing that reflects this court's decision as set forth in this letter opinion.

Sincerely,

//s//

Gary R. Tabor, Judge

Judge Daniel Berschauer
Hearing date: November 2, 2001

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON, SUSANNAH SIMPSON, And TRACY WOLCOTT, Plaintiffs, v. WASHINGTON EDUCATION ASSOCIATION, Defendant.	No. 01-2-00519-4 DECLARATION OF AIMEE S. IVERSON

AIMEE S. IVERSON, on oath declares as follows:

1. I am one of the attorneys for the Defendant. I make this declaration based on my personal knowledge, and I am competent to testify as to the matters stated herein.

2. Attached hereto as Exhibit A is a true and correct copy of the 2000-01 WEA Membership Enrollment Guide that was produced to Plaintiffs in discovery, bearing identification numbers "WEA-DAV 2343-2408".

* * * * *

I have read the foregoing, believe it to be correct, and certify and declare the same under penalty of perjury of the laws of the State of Washington.

Signed at Federal Way, Washington this 25th day of October, 2001.

//s//
Aimee S. Iverson
WSBA #28610

[COVER]

2000-01

Membership Enrollment Guide

WEA Washington Education Association

Exhibit A

[WEA-DAV 2343]

[INSIDE COVER]

2000-2001 WEA Membership Enrollment Guide

TABLE OF CONTENTS

Eligibility for WEA Membership 1

Membership Classifications 2

WEA / NEA Membership Processing 5

Membership Contacts 8
Local Association Responsibilities 10
Payroll Office Responsibilities 11
Calendar of Important Dates 13

Membership Materials 14

Membership Code Tables 16

Dues Collection 19

APA Information 20
ESP (Classified Employees) 22
Cash Membership 24
Political Action Committee (PAC) Contributions 25
Agency Fee Payers 26

NEA / WEA Dues and Contribution Amounts 27

Forms Distribution Summary 36
Sample Forms 37

NEA Student Rebate 53

Local Association Membership Contacts 57

(Alpha listing of local associations)

Payroll Office Responsibilities

The primary responsibility of the payroll office is to make monthly deductions of authorized membership dues and contributions as authorized under state law and as provided in bargaining contracts with employee groups. Payroll offices are authorized under collective bargaining statutes to make payroll deductions of association dues and insurance premiums when authorized by the written consent of an employee (RCW 28A.405.400, 28B.52.045, 41.04.020, 41.56.110, 41.59.060).

It is important that the payroll officer work closely with a representative of the local association in administering dues deductions. Questions on the APA billing may be directed to the WEA/APA office at Premera Blue Cross. Membership questions may be directed to the WEA membership staff.

Changes in dues amounts each year are initiated by the WEA office, working in conjunction with Premera Blue Cross for continuing members on the October 1 billing, which is for the September payroll.

Members may be added to or deleted from the APA billing by the payroll office as directed by the local association. Terminated employees should be removed from the billing at the date of termination. **If termination occurs prior to the end of the school year, the balance of annual dues should be deducted from the last paycheck.**

In school districts where an agency fee clause is part of the bargaining agreement, all new employees should begin paying dues immediately as agency fee payers, pending a possible subsequent change in status to

member once a signed membership enrollment form is provided.

The payroll office will receive a copy of the membership enrollment form as an authorization for deductions. This form, along with the APA dues distribution form provided by the local association should be filed for reference.

Continuing members will have dues deducted:

- 12 months – September-August (October 1 - September 1 APA billing dates)

OR

- 10 months – September-June (October 1 - July 1 APA billing dates)

Do not deduct NEA FCPE or WEA-PAC for Agency Shop fee payers, Community College, Technical College and 4-year University members.

* Note (from page 10):

If signed enrollment form is not received by WEA for a new employee and his or her name appears on the membership dues billing, that person will be considered an Agency Fee Payer. (See more information on Agency Fee on page 26.)

Enrollment Calendar

August: Distribution of Materials

- Membership materials are mailed directly from WEA to local association Presidents.
- Membership materials are then distributed to building representatives.

September: Sign-up Time

- WEA must receive a signed enrollment form for each member if services are to be provided. Use the multi-part enrollment form to enroll new APA and cash members. Send one copy of the enrollment form, dues distribution and/or cash dues distributions forms to WEA. **Important: During heavy enrollment times, please remit weekly.**
- Return membership roster and agency fee payer roster to WEA with corrections.
- Contact payroll office to set up new deductions.
- Distribute new membership cards and calendar books to continuing members.
- Return unused preprinted membership cards to WEA with notation for reason returned.
- Give new members a calendar book and other promotional literature. Membership cards will be mailed by WEA directly to new members added during the year.

- Write check to WEA for payment of cash dues and contributions, including NEA, WEA, Community Outreach, UniServ and Local dues. If applicable, NEA FCPE and WEA-PAC contributions should be remitted separately.

September, October and November: Adding New Members

- Give the payroll officer the names and amounts of dues to be deducted for new members using multipart dues distribution and signed enrollment forms. Payroll officers should add new members immediately to the next billing.
- Deadline to return corrected membership roster and agency fee payer roster to WEA is October 10.

Calendar of Important Dates

* May 31	Deadline for UniServ Dues to be reported to WEA.
* July 31	Deadline for Local dues to be reported to Premera Blue Cross, the School District payroll office, WEA and the UniServ council.
August 9-13	Arrival of membership materials.
August 31	Last date for continuing members to terminate membership for the coming year.
September	Dues deductions begin for new school year.
October 10	Annual cash membership payment is due. Return corrected membership roster and agency fee payer roster to WEA.
October 31 **	Last date for new persons employed in September to enroll and receive legal services for the current membership year.
December 1 **	Deadline for new membership enrollment forms to be received by WEA to qualify for WEA and NEA delegate requirements.
December 15	Deadline for Local Associations to report names and addresses of all new Agency Fee payer employees to the appropriate WEA Membership Contact.

May 1	Deadline for NEA Student Rebate Request.

* If local or UniServ dues amounts are not received by these dates, payroll offices will be billed at the same rate as the previous year. Local or UniServ dues adjustments will not be made until February 1 billing (January payroll).

** New members must have dues deducted for the month of October to qualify as dues paying members for delegate purposes.

Agency Fee Payers

Most bargaining units negotiate contracts with employers that contain an Agency Fee Provision. This agreement provides that since the Local Association is recognized as the sole collective bargaining agent for a bargaining unit, even though an employee may not wish to become an Association member, he/she is still required to pay a fee equal to dues in return for bargaining and representation services.

In Agency Fee units, all new employees should begin paying either Agency Fees or Dues immediately. **An Agency Fee payer may become a Member at any point by signing a Membership Enrollment Form.**

National, State, UniServ and Local Agency Fees equal to dues amounts must be deducted. Follow directions for calculating Agency Fees in the same manner as for active members, except that Community Outreach dues and Political Action contributions (NEA FCPE and WEA-PAC) are **not** to be deducted.

The Local Treasurer or Payroll Office should:

- Complete an Agency Shop Employee form--it is not necessary for the employee to sign this form.
- Complete the Agency Shop Fee Payer Roster Report and return it to the WEA Membership Department.

WEA will not accept Agency Fees from ESP Extra-Curricular employees.

WEA will not accept Agency Fees from Substitute teachers without annual, express approval by the WEA Legal Department.

It is essential that WEA be notified of Agency Shop Fee payers in order to provide necessary services as provided under RCW 28A.72.

Agency Fee Payers are not Association Members, and will not be issued Membership Cards.

DO NOT deduct Community Outreach, NEA FCPE or WEA-PAC contributions from Agency Fee payers.

[29] ANNUAL MEMBERSHIP DUES

	WEA Class/ Subclass	NEA Dues	WEA Dues
Active Certificated Membership			
Certificated 0.67 - 1.00 FTE	AC-1-100	$123.00	$287.00
Certificated 0.51 - 0.66 FTE	AC-1-66	$123.00	$143.50
Certificated 0.34 - 0.50 FTE	AC-1-50	$64.00	$143.50
Certificated 0.26 - 0.33 FTE	AC-1-33	$64.00	$95.50
Certificated 0.25 or less FTE	AC-1-25	$34.50	$95.50
Substitutes	AC-1-1	$34.50	$95.50 / $48.00
Daily Full-Day Rate (90 Days		$0.38	$1.06
Daily Half-Day Rate (90 Days)		$0.38	$0.53
Part-Time AHE	AC-1-17	1% of gross quarterly salary plus $1.67 per quarter for NEA Special Dues	

Higher Education employees are ineligible to
via payroll deduction, but may become cash

Active ESP Membership			
ESP 0.51 - 1.00 FTE	AC-2-100	1% of monthly base salary plus $0.42 per month for NEA Special Dues	
ESP 0.26 - 0.50 FTE	AC-2-50		
ESP 0.25 or less FTE	AC-2-25		
ESP Substitutes	AC-2-1	$20.37	$48.00
ESP Extra-Curricular	AC-2-123	$20.37	$12.00

NEA FCPE and WEA-PAC are optional for all members,
WEA-PAC requires a new, signed author

2000-2001 (continued)

Community Outreach	NEA FCPE		WEA-PAC
$12.00	$12.00	DO	$12.00
$12.00	$12.00		$12.00
$12.00	$12.00	NOT	$12.00
$12.00	$12.00		$12.00
$12.00	$12.00	Deduct	$12.00
$12.00	$12.00		$12.00
		WEA-PAC	
$0.13	$0.13		$0.13
		without	
$0.13	$0.13		$0.13
		an	
$4.00/ quarter		annual	

contribute to NEA FCPE or WEA-PAC members.

$12.00/ year	$12.00	signed	$12.00
$12.00/ year	$12.00		$12.00
$12.00/ year	$12.00	Authori-	$12.00
$12.00	$12.00	zation	$12.00
	$12.00		$12.00
		Form	

and require a signed authorization.
ization each year.

WEA-DAV 2371

BEST AVAILABLE COPY

[30] ANNUAL MEMBERSHIP DUES

	WEA Class/ Subclass	NEA Dues	WEA Dues
NEA Life Members	(offered prior to July, 1973)		
Certificated 0.67 – 1.00 FTE		$0.00	$287.00
Certificated 0.51 - 0.66 FTE		$0.00	$143.50
Certificated 0.34 - 0.50 FTE		$0.00	$143.50
Certificated 0.26 - 0.33 FTE		$0.00	$95.50
Certificated 0.25 or less FTE		$0.00	$95.50
Substitutes		$0.00	$95.50 / $48.00
Part-Time AHE	1% of gross quarterly salary		
ESP 0.51 - 1.00 FTE	1% of monthly base salary		
ESP 0.26 - 0.50 FTE	1% of monthly base salary		
ESP 0.25 or less FTE	1% of monthly base salary		
ESP Substitutes	1% of monthly base salary		
Agency Shop Fee Payers			
Certificated 0.67 – 1.00 FTE	FP-1-100	$123.00	$287.00
Certificated 0.51 - 0.66 FTE	FP-1-66	$123.00	$143.50
Certificated 0.34 - 0.50 FTE	FP-1-50	$64.00	$143.50
Certificated 0.26 - 0.33 FTE	FP-1-33	$64.00	$95.50
Certificated 0.25 or less FTE	FP-1-25	$34.50	$95.50
Substitutes	FP-1-1	$34.50	$95.50 / $48.00
Part-Time AHE	FP-1-17	1% of gross quarterly salary plus $1.67 per quarter for NEA Special Dues	
ESP 0.51 - 1.00 FTE	FP-2-100	1% of monthly base salary plus $0.42 per month for NEA Special Dues	
ESP 0.26 - 0.50 FTE	FP-2-50		
ESP 0.25 or less FTE	FP-2-25		

NEA FCPE and WEA-PAC are optional for all members,
WEA-PAC requires a new, signed author

2000-2001 (continued)

Community Outreach	NEA FCPE		WEA-PAC
$12.00	$12.00	DO	$12.00
$12.00	$12.00	NOT	$12.00
$12.00	$12.00	Deduct	$12.00
$12.00	$12.00	WEA-PAC	$12.00
$12.00	$12.00	without	$12.00
$12.00	$12.00	an	$12.00
		annual	
$4.00/quarter		signed	
$12.00/year	$12.00	Authori-	$12.00
$12.00/year	$12.00	zation	$12.00
$12.00/year	$12.00	Form	$12.00
$12.00/year	$12.00		$12.00

Do Not Deduct Community Outreach, WEA-PAC or NEA FCPE from Agency Shop Fee Payers

and require a signed authorization.
ization each year.

WEA-DAV 2372

Forms Distribution Summary

(Sample forms are on the following pages)

Forms	Part 1	Part 2
Enrollment Form	WEA	Payroll Office
Cash Renewal Form	WEA	Payroll Office
SWEA Form	SWEA	
WEA-Retired Form	WEA-Retired	
Agency Shop Form	WEA	Payroll Office
Notification Of Cancellation Form	WEA	Payroll Office
Personal Data Change Form	WEA	Payroll Office
WEA-PAC Authorization Form	WEA	Payroll Office
NEA FCPE Authorization Form	WEA	Payroll Office
APA Dues Distribution Form	WEA	Payroll Office
Cash Dues Distribution Form	WEA	Payroll Office
Local Dues Notification Form	WEA sends to local presidents in mailing	Local President completed form WEA, School

[con't on next set of facing pages]

Part 3	Part 4
Local Association	Member
Local Association	Member
Local Association	
Local Association	
Local Association	
Local Association	
Local Association	
Local Association	
Local Association	

should send a photo copy of the
to the following: Premera Blue Cross,
District office and Uniserv Council office

Forms	Part 1	Part 2
WEA Membership Forms Request	WEA Membership Department as needed	
Continuous Roster	WEA sends to local presidents in mailing	
Renewal Roster	WEA sends to local presidents in mailing	
Agency Fee Payer Roster	WEA sends to local presidents in mailing	

Part 3	Part 4
Return 1 part to WEA by Oct. 10, with corrections	
Local corrects & returns to WEA	
Local corrects & returns to WEA	

[41]

WEA Washington Education Association

AGENCY SHOP EMPLOYEE FORM

PLEASE PRINT

The following employee has chosen not to join the Association representing the bargaining unit, and will have representation fees deducted monthly from payroll. (Employee signature is not required.)

Social Security Number ☐☐☐-☐☐-☐☐☐☐

Today's Date _____ Date of First Deduction _____

Local Association _____ School District/ESD _____

Job Title/Subject _____ School Bldg/Work Site _____

☐ Certificated ☐ Classified ☐ Higher Ed FTE _____

Last Name _____ First Name _____ Middle _____

Current Address (Street, Route or box) _____ Apt. # _____

City _____ State _____ Zip _____

Home Phone _____

Completed by _____

Please return top copy to WEA Membership Department 33434 8th Ave. S. Federal Way, WA 98003-6397 253-941-6700

AMOUNT OF ANNUAL DUES

NEA	WEA	UNISERV	LOCAL

White - WEA Membership Copy Yellow - Payroll Office Copy Pink - Local Association Copy

10/97

WEA-DAV 2383

[44]

WEA-PAC

Washington Education Association Political Action Committee

WEA-PAC Membership Authorization

This authorization is valid for no more than twelve (12) consecutive months. It is effective on **September 1, 2000**, and it expires on **August 31, 2001**.

Name _____ SS# _____
(Last Name) (First Name) (Middle Initial)

Local Association _____ Work Site _____

Home e-mail address

☐ Certificated ☐ Higher Education ☐ Staff
☐ Classified ☐ WEA-Retired ☐ Student

Cash or Check Contributions

I wish to contribute to WEA-PAC and hereby enclose **cash** or **check** in the following amount: ☐ $12 ☐ $24 ☐ $60 ☐ $120 ☐ Other _____

Payroll Deduction Contributions

☐ I authorize the _____ School District to withhold **$12.00** per year from my earnings in order to make political contributions to the Washington Education Association Political Action Committee in Federal Way, Washington. *Note: Higher Education, Retired and Student members are not eligible for the payroll deduction option.*

Signature _____ Date _____

According to state law, no employer or labor organization may discriminate against an officer or employee in the terms and conditions of employment for (a) the failure to contribute to; (b) the failure in any way to support or oppose; or (c) in any way supporting or opposing a candidate, ballot proposition, political party or political committee.

WEA Washington Education Association 33434 8th Avenue S., Federal Way, WA 98003-6397 253-941-6700 FAX: 253-946-4692

Original - WEA Membership Department Yellow - District Payroll Office Pink - Local Association

WEA-DAV 2386

[Caption omitted in printing.]

DECLARATION OF MILTON L. CHAPPELL IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

MILTON CHAPPELL, on oath declares as follows:

1. I am one of the attorneys for the Plaintiffs. I make this declaration based on my personal knowledge, and I am competent to testify as to matters stated herein.

2. Attached hereto as Exhibit A is a true and correct copy of the Defendant's Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents to Defendant Washington Education Association.

* * * * *

I have read the foregoing, believe it to be correct, and certify and declare the same under penalty of perjury of the laws of the State of Washington.

Signed at Springfield, Virginia this 30th day of October, 2001.

//s//

Milton L. Chappell, Esq.
c/o National Right to Work
Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160

[Caption and title omitted in printing.]

Exhibit A

INTERROGATORY NO. 6: For each named Plaintiff, state the information requested:

	Date Joined WEA	Date Resigned WEA	Dates An Agency Fee Payer	Amounts Paid in Agency Fees by Fiscal Year
Gary Davenport	None	None	9/98-4/00	98-99 $195.45 99-00 $190.48
Martha Lofgren	None	None	9/1/97 to present	97-98 $115.20 98-99 $ 80.80
Walt Pierson	1977	1995	9/1/95 to present	See below
Susannah Simpson	None	None	9/1/96 to 8/31/00	See below
Tracy Wolcott	2/18/00	8/01	9/1/94 to 2/18/00 and 9/01 to present	See below

INTERROGATORY NO. 6 (CONTINUED)

See General Objection 1. Without waiving this objection, for the years in which a named plaintiff paid agency fees, named Plaintiffs, Pierson, Wolcott and Simpson paid the following amount in agency fees for each respective year:

1997-98	$265
1998-99	$272
1999-00	$272
2000-01	$287
2001-02	$295

[Caption omitted in printing.]

DECLARATION OF JUDITH LONNQUIST

JUDITH A. LONNQUIST, on oath declares as follows:

1. I am one of the attorneys for the Defendant. I make this declaration based on my personal knowledge, and I am competent to testify as to the matters stated herein.

2. Attached hereto are true and correct excerpts from the deposition transcripts of Gary Davenport, Martha Lofgren, and Susanna Simpson. Although the depositions of Walt Pierson and Tracy Wolcott have been taken, the transcripts have not yet been prepared.

I have read the foregoing, believe it to be correct, and certify and declare the same under penalty of perjury of the laws of the State of Washington.

Signed at Seattle, Washington this 1st day of November, 2001.

//s//
Judith A. Lonnquist
WSBAA #06421

[Caption & title page omitted in printing.]

Deposition Transcript of Gary Davenport [10/18/01]

* * * * *

[16]

23 Q When you first were offered a non-continuing
24 contract with the Kent School District were you
25 also offered the opportunity to join the education

[17]

1 association?
2 A Yes.
3 Q And I take it you declined?
4 A In declining by not signing?
5 Q Well, did you join?
6 A No.
7 Q And was there a reason why you didn't join?
8 A I didn't really want to be part of the union.
9 Q Why?
10 A I think in talking with some of the people that
11 were involved in it, our maybe philosophies are
12 different.
13 Q Okay. Could you expand on that for me, please?
14 A I mean, in how in I think the purpose or the intent
15 of some of the things that go on in a union shop.
16 Q Let me ask you a few more specific questions then.

17 You said you talked to people involved in
18 the association. Who did you talk to?
19 A I don't know his first name but a Mr. Walker I
20 believe was the current president of the local
21 KEA.

* * * * *

[20]

11 Q In fact do you know whether people that you taught
12 with knew whether or not you were a member of the
13 KEA or not?
14 A The people in my department did. And I think both
15 our departments, the social studies and English
16 department did.
17 Q But there wasn't any problem, you didn't have any
18 problem with that?
19 A There were -- I can't specifically remember but
20 there were times where you might get the feeling
21 that somebody might say something about it or had
22 said something about it to other people.
23 Q And how did you know that?

24 A Just by coming in on conversations or something.

* * * * *

[25]

21 Q Okay. Did you ever receive a big packet of
22 materials from the WEA?
23 A A big packet from the WEA?
24 Q Correct.
25 A Not that I remember. I remember more getting

[26]

1 something from the KEA rather than the WEA.

* * * * *

[27]

4 Q Okay. How about school levies, do you -- did Kent
5 run any school levies while you were teaching
6 there?
7 A Yes.
8 Q Were you living in the district too at the time?
9 A Yes.
10 Q Did you vote in favor of the levies?
11 A I don't believe I did.
12 Q Okay. Why not? You didn't want your taxes to go
13 up?
14 A The why-not question? Or the second one?
15 Q I was leading the witness.

A Right. I voted no I believe because the levies always go up. And it seems as though we're promised that we'll do better things if we have more levies and yet we continue to be promised more things to have more levies.

Q Have you ever voted for a school levy?

A Yes.

* * * * *

[36]

Q And if you were to learn that your agency fees in fact don't go to supporting individual candidates, would that change your feelings about this lawsuit?

A If I were to learn that they didn't go --

Q (Interposing) Did not go to support individual candidates would that change your feelings about this lawsuit?

A I don't believe so because it wasn't limited just to political candidates, that was just one of the inclusions in politics.

Q What else do you understand -- let me ask it this way. What else do you understand to be in politics, in the term politics, with which you disagree that fees should be spent for or could be

spent for?

A Probably in -- I guess one, representing the people that are being chosen. And then also two, probably some of programs that--educational programs or so that I might disagree with.

Q What educational programs?

A An educational program I guess if I voted yes on the vouchers or the charter schools, I would say if money was used to combat that then that would be something I guess I would disagree with.

* * * * *

[Caption & title page omitted in printing.]

Deposition Transcript of Martha Lofgren [10/18/01]

* * * * *

[9]

Q And were you offered an opportunity in the '96-'97 school year to join the Kent Education Association and its affiliates?

A I believe I was, yes.

Q And tell me about that, how were you offered that opportunity?

A It must have come in the mail, some form.

* * * * *

Q And in whatever form it was I take it you didn't exercise the opportunity to join?

A That's correct.

Q Okay. And was there a reason for that?

A Yes.

Q And tell me the reason, please.

A I disagree with the union on moral and political issues.

[10]

Q What moral and political issues?

A The union has stated that they see homosexuality as a legitimate alternative lifestyle. I do not agree with that. They're also against school choice and vouchers. And I believe they support candidates that I cannot support.

Q And on what do you base your understanding of the union's positions?

A I have received or looked at some publication they put out, I don't recall the name. And I did read their statement, I don't know what they call it but it lists outright what they stand for. And the homosexuality issue was mentioned in there.

Q And was this a document from the Kent Education Association or from the Washington Education Association?

A I believe it was from the Washington Education Association.

Q And when you say you read something that they put out would that have been like a newspaper or a letter, do you recall?

22 A I think it's a magazine format.

* * * * *

[25]

1 Q Okay. And do you believe that it was -- do you
2 believe that it was appropriate for your bargaining
3 representative, the Kent Education Association, to
4 support school levies?
5 A I don't think I can generalize and say that.
6 Q It would depend on what the levy is for?
7 A Yes.
8 Q Okay. But as a concept you don't -- you don't have
9 any moral or political opposition to association
10 supporting an appropriate school levy do you?
11 A I don't have any opposition to that.

* * * * *

19 Q Do you recall Initiative 173?
20 A Not now.
21 Q Charter schools?
22 A Vaguely.
23 Q Do you know did you vote in that -- for that?
24 A I probably did.

* * * * *

[26]

BY MS. LONNQUIST:

Q Did you support -- did you vote yes on the initiative?

A I believe I did.

Q Okay. Did you contribute money to the political campaign committee that supported Initiative 173?

A No.

Q Okay. And did you hold a political position or any kind of position that charter schools would help or hurt the public education system?

A I did not think of their effect on the public education system. I'm thinking of the needs and the welfare of students.

Q So you believe -- I'm sorry, go ahead.

A If it helps students and that happens to hurt public schools, then so be it. What's more important, the students or maintaining a public school system that may not be as good as it could be.

* * * * *

[27]

Q Initiative 177 was an initiative that would

establish a voucher system, I heard you say something about vouchers earlier?

A Yes.

Q You support a voucher system?

A Yes.

Q And that would be for both private and parochial schools?

A Yes.

[28]

Q I take it you voted in favor of Initiative 177?

A Yes.

Q Do you recall Initiative 732, which was a cost of living adjustment for public school employees?

A Yes, I do.

Q And you know that one passed?

A Well, I didn't keep track of it much.

Q Did you support that initiative?

A No.

Q Why not?

A I wasn't sure if it was the right thing to do and I thought until I'm absolutely sure vote no.

* * * * *

[31]

Q If you learned that neither the WEA nor the Kent or

Auburn Education Associations supports political candidates would that change your position about not joining?

A No.

Q Is there any anything that would prompt you to join a labor union at this point in your career?

A If I read a statement by this union that indicated that they had similar values to mine I might join.

Q And when you say similar values are you referring to homosexuality?

A That would be one.

Q All right. What are the others?

A Probably something along the lines of acknowledging God and a statement about -- something more patriotic and probably it would have to include something about school choice.

Q And when you say school choice what are you referring to?

A For parents to be able to decide which school to

[32]

send their children to.

Q Don't parents have that choice now?

A No. Well, not within the public school system we don't. And I think we should be allowed to use our contributions, our tax contributions -- we should be allowed to take those to the school of our choice, whether it's a public school or private.

* * * * *

[Caption & title page omitted in printing.]

Deposition Transcript of Susanna Simpson [10/18/01]

* * * * *

[10]

10 Q Okay. When you became a full-time employee of the
11 Edmonds School District in the '96-'97 school year
12 were you offered the opportunity to join the
13 education association?
14 A Yes.
15 Q How did that come about?
16 A I believe it was just in the paperwork that they
17 gave me when I got the position.
18 Q Did you do so?
19 A No, I did not.
20 Q Why not?
21 A I didn't go into teaching wanting to be part of a
22 union. My goal was strictly to teach the kids and
23 be able to enjoy that and I didn't really want to
24 have anything to do with the things that the union
25 does, the political side, the strikes.

[11]

1 Q Has there been a strike in the Edmonds School

District since you joined the staff?

A Yes.

Q And when was that?

A I don't remember the exact date, it was a one-day walkout.

Q Was it the year you began teaching?

A No.

Q It was later. So when you say you didn't join in '96-'97 because of strikes, was that just a general opposition to labor stoppage, work stoppages?

A Yes, as far as education goes.

Q Uh-huh, okay. Anything else about being a member of a union other than the political side and strikes that prompted you not to join?

A No.

Q When you say the political side what are you referring to?

A I didn't want to be involved in any of the political things that they may work on or support. I would prefer to chose myself what I support politically with my money and time.

Q And what was your understanding about the political

25 things in which the Edmonds Education Association

[12]

1 was involved?

2 A Not a ton at the time. It was more just not

3 wanting to be involved.

4 Q Not wanting to be involved in general?

5 A Right.

6 Q Okay. Did you make any inquiries in '96-'97 about

7 what kinds of activities the union was engaged in?

8 A Not specifically that I recall.

9 Q Then the following year, '97-'98, were you again

10 offered an opportunity to join the union?

11 A Yes, I was.

12 Q And you declined for the same reasons?

13 A Yes.

* * * * *

[14]

19 Q Have you received any communication at all from the

20 WEA or the EEA?

21 A Since I was hired?

22 Q Yes.

23 A Yes.

Q What kinds of publications have you received?

A One of them is a very large packet that comes every

[15]

year.

* * * * *

Q Okay. * * * Tell me about the large packet, it comes in the mail, what do you do with it?

A I read the front page maybe, scan it, and put it in a drawer.

Q Still have them?

A I may have one in my files which are packed away.

But I may have one.

Q Have you ever read it from cover to cover?

A No.

Q Why not?

A Because it's very, very large. And it comes at a time when teachers are especially busy.

Q Comes in October generally?

A Sometime around September, October.

Q And then doesn't another one come in December?

A I'm not sure, I don't remember.

[16]

Q Has anybody ever explained to you what the packet is?

A No.

Q So do you have any idea as to whether or not the packet notifies you that if you want to contact the WEA you can get some money back?

A I do now. I did not at the time.

* * * * *

[22]

Q Do you recall that there was a ballot proposition with respect to charter schools?

A Yes.

Q Did you favor or oppose that ballot initiative?

A I don't recall exactly how it was stated so it would be hard for me to say. I know my opinion on the subject.

Q What is your opinion on the subject?

A I'm in favor of charter schools.

Q What's the basis for your support of that proposition?

A It allows choice for parents and kids.

Q Do you recall whether you voted for the charter

schools initiative?

A I voted in favor of charter schools.

Q Okay. And do you recall there being a ballot proposition with respect to vouchers?

A Yes.

Q What's your position on vouchers?

A I'm in favor of vouchers.

[23]

Q Even if used to support parochial education?

A I'm in favor of anything that offers choice and opportunity.

Q Okay. Did you vote in favor of the voucher initiative?

A Again, I don't recall the exact wording on the ballot but I would have voted in favor of having vouchers, yes.

* * * * *

Q Sure. I think it was in 1999 or 2000, there was a ballot proposition that automatically adjusted the salaries of classroom teachers based on whether or not there had been inflation in the cost of living. Those are called COLAs, cost-of-living adjustments. As a general rule do you support that

proposition, that teachers' salaries should go up as inflation goes up?

A Yes, I believe salaries should increase with inflation.

[24]

Q Okay. And do you recall whether you voted yes on that proposition?

A I don't recall. I only vaguely recall it for some reason.

Q Okay. Do you recall that a year or so ago there was a ballot proposition that reduced class size?

A Again, vaguely.

Q Do you support reduction of class size?

A I would like a smaller class.

Q Why?

A The fewer students you have the more time you can spend with each one.

Q So do you find -- have you had various class sizes in the course of your teaching experience?

A Yes.

Q And are you a more effective teacher in a smaller class?

A Yes, I would say so.

Q Do you recall whether or not you voted yes on the

class-size referendum?

A I don't recall.

Q If you were guessing you'd say probably yes?

A I would have to say I would look at what the opposite side was, what it was costing before I would make a decision.

* * * * *

[25]

Q Since you have been employed in the Edmonds School District have there been levy elections in Edmonds?

A In Edmonds, yes.

Q And were you supportive of -- not necessarily voting for it or working for it -- but were you generally supportive of the passage of levies in the Edmonds School District?

A I didn't pay that much attention.

Q Do you understand what levies are for?

[26]

A Yes.

Q Okay. Tell me what your understanding is.

A It would be generally increases the property tax to provide more funding for whatever they are pushing

for that levy, whether it be new buildings, class size, new teachers.

Q And as a matter of general principle do you support rehabilitating old school buildings and hiring new teachers if needed and reducing class size?

A Yes.

Q Do you have any philosophical, moral, religious, spiritual opposition to labor unions?

A No.

Q Hypothetically if the class-size initiative, which passed, had the effect of reducing class size in the Edmonds School District, would you support that?

A It would depend upon what the cost was.

Q Okay. And if you -- when you return to school as a teacher in the Edmonds School District you in fact had a smaller class, would you be appreciative of that?

A Yes.

Q Okay. Same thing with respect to the cost-of-living adjustment. If when you ultimately

[27]

return to teaching in the Edmonds School District

and you found out that because of the

cost-of-living adjustment you've gotten two

increases, two step increases in your salary, would

you be appreciative of that?

A Yes.

RELEVANT DOCKET ENTRIES

PDC v. WEA

THURSTON COUNTY SUPERIOR COURT
No. 00 2 01837 9

October 9, 2000 Complaint

March 9, 2001 Amended Answer

April 6, 2001 Defendant WEA's Motion For Summary Judgment And Memorandum In Support Of Summary Judgment

April 6, 2001 Plaintiff PDC's Motion For Summary Judgment And Memorandum In Support Of Summary Judgment

April 23, 2001 Defendant WEA's Response To Motion For Summary Judgment

April 23, 2001 Plaintiff PDC's Response To Motion For Summary Judgment

April 30, 2001 Defendant WEA's Reply To Response To Motion For Summary Judgment

April 30, 2001 Plaintiff PDC's Reply To Response To Motion For Summary Judgment

May 5, 2001 Summary Judgment Hearing

May 11, 2001 Plaintiff PDC's Trial Brief

May 14, 2001 Non-Jury Trial

May 14, 2001 Plaintiff PDC's Supplemental Trial Brief

May 15, 2001 Order Granting Summary Judgment To Plaintiff PDC

May 15, 2001 Order Denying Summary Judgment To Defendant WEA

May 17, 2001 Defendant WEA's Supplement Trial Brief

July 31, 2001 Court's Decision (Letter Opinion)

November 7, 2001 Letter Statement Of Defendant RE Proposed Findings And Conclusions

November 7, 2001 Memorandum Concerning Injunction (Proposed Injunction Itself)

November 7, 2001 Memorandum Of Plaintiff RE Injunction (Supporting Proposed Injunction)

November 8, 2001 Defendant's Reply RE Injunction

November 9, 2001 Motion Hearing Findings And Conclusions And Injunction

November 15, 2001 Motion Hearing (cont'd) Findings And Conclusions And Injunction

December 3, 2001 Final Judgment

December 3, 2001 Entry Of Findings Of Fact And Conclusions Of Law

December 3, 2001 Entry Of Order For Permanent Injunction

December 6, 2001 Motion By Plaintiff For Costs And Fees

December 21, 2001 Reply Of Defendant RE Plaintiff's Costs And Fees

December 31, 2001 Notice Of Appeal to Court Of Appeal

December 31, 2001 Plaintiff's Reply Memorandum For Cost And Fees

January 4, 2002 Motion Hearing Plaintiff's Costs And Fees

January 4, 2002 Entry Of Order For Costs And Fees

WASHINGTON COURT OF APPEALS
No. 28264-0-II

April 29, 2002 Opening Brief on Behalf of Appellant, Washington Education Association

July 23, 2002 Respondent WEA's Brief

November 18, 2002 Appellants Reply Brief

February 3, 2003 Amicus Curiae Brief National Education Association

February 20, 2003 PDC Answer To amicus Curiae Brief National Education Association

February 24, 2003 Amicus Curiae Brief Washington State Labor Counsel

February 24, 2003 Amicus Curiae Brief Pacific Legal Foundation

March 14, 2003 PDC Answer To Amicus Curiae Brief Washington State Labor Counsel

March 21, 2003 WEA Answer To Amicus Curiae Brief Pacific Legal Foundation

March 27, 2003 Oral Argument Hearing

June 24, 2003 Opinion

July 15, 2003 WEA's Emergency Motion For Stay Of Injunction

July 21, 2003 PDC's Response To Motion

July 23, 2003 Reply In Support Of WEA's Emergency Motion For Stay Of Injunction

July 24, 2003 Order Granting Stay Of Injunction

WASHINGTON SUPREME COURT
No. 74268-5

July 24, 2003 PDC's Petition For Review

August 21, 2003 WEA's Answer To Petition For Review

September 5, 2003 PDC's Reply to PDC's Answer To Petition For Review

October 2, 2003 Amicus Curiae Brief Pacific Legal Foundation

November 13, 2003 WEA's Answer To Amicus Curiae Brief Pacific Legal Foundation

February 3, 2004 Order: Petition For Review Is Granted And Davenport Is Consolidated

March 22, 2004 Supplemental Brief Of Petitioner PDC

March 23, 2004 Supplemental Brief of Respondent WEA [PDC]

March 23, 2004 Supplement Brief Of Respondent WEA's [Davenport]

March 26, 2004 Amicus Curiae Brief Pacific Legal Foundation

April 12, 2004 Amicus Curiae Brief Washington Federation Of State Employees

April 27, 2004 Respondent WEA Answer To Amicus Curiae Brief Of Pacific Legal Foundation

May 4, 2004 Amicus Curiae Brief Washington State Labor Council

May 4, 2004 Amicus Curiae Brief National Education Association

May 13, 2004 Petitioner PDC Answer To Amicus Curiae Briefs Of Washington Federation Of State Employees, Washington State Labor Council, And National Education Association

May 27, 2004 Oral Argument Hearing

March 16, 2006 Opinion

April 10, 2006 Mandate

October 2, 2006 Letter From United States Supreme Court Advising The Petition For Writ Of Certiorari Is Granted

FILED
Oct 09 2000
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, ex. rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, Plaintiff, v. WASHINGTON EDUCATION ASSOCIATION (a Washington Non-Profit Corporation), Defendant.	No. 00 2 01837 9 COMPLAINT FOR VIOLATION OF RCW 41.27.760

The plaintiff, for causes of action against the defendant, alleges as follows:

PARTIES

1.1 The Washington State Public Disclosure Commission (Commission) was established by RCW 42.17.350 and is charged by RCW 42.17.360-.370 with, *inter alia*, the responsibility of enforcing RCW 42.17.760. The Commission office is in Olympia, Washington. The Commission investigated a complaint against the defendant. The Commission referred this matter to the Attorney General's Office under RCW 42.17.395(3) for review and potential legal action under RCW 42.17.390 and RCW 42.17.400. The Attorney General also received

a citizens' complaint letter against the defendant under RCW 42.17.400(4).

1.2 The defendant Washington Education Association (WEA) is a labor organization representing public school and educational employees in Washington. The WEA is a non-profit corporation in Washington, headquartered in Federal Way, Washington with offices in Olympia and Spokane, Washington.

JURISDICTION AND VENUE

2.1 This Court has subject matter jurisdiction over the defendant under RCW 42.17.400.

2.2 The defendant has carried out the violations alleged, in whole or in part, in Thurston County. Venue is proper in this Court pursuant to Chapter 4.12 RCW.

LAW

3.1 RCW 42.17.760 requires that: "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual."

FACTUAL ALLEGATIONS

4.1 On September 25, 2000, the WEA, through its legal counsel, signed a "Stipulation of Facts, Violations and Penalty" in the Commission case *In the Matter of the Enforcement Action Against the Washington Education Association, Respondent*," Commission case number 01-002 ("Stipulation"). A true and correct copy of the Stipulation is attached to this Complaint and incorporated by reference. Upon accepting the Stipulation, the Commission voted unanimously to refer the case to the Attorney General's Office because it found an apparent violation of RCW 42.17.760, based on the actual violations agreed to by the WEA. The Commission

also found that its penalty authority was insufficient given the stipulated facts in this case and that a referral was warranted.

4.2 The WEA is a labor organization. Stipulation ¶1.

4.3 The WEA has approximately 68,000 current dues paying members. Dues received by the WEA from its members, or portions thereof, are deposited in the WEA general treasury.

4.4 The WEA also collects "agency shop fees" from those public school and educational institution employees whom it may legally charge with the cost of union representation and negotiation, but who choose not to become members of the labor organization ("agency fee payers"). *See* RCW 41.59.100.

4.5 The WEA collects agency shop fees from approximately 4,407 agency shop fee payers. These funds are deposited in the WEA's general treasury. Stipulation ¶2.

4.6 During the past five years, the WEA has expended funds from its general treasury for political contributions described in RCW 42.17.760. A portion of these expenditures is attributable to agency fee payers in proportion to their contributions into the WEA general treasury.

4.7 The WEA stipulated that it did not have affirmative authorization from agency fee payers to use their money to make contributions and expenditures to influence an election or operate a political committee. Stipulation ¶¶ 3 - 4.

CLAIM

Based on the foregoing allegations, plaintiff makes the following claim:

5.1 The WEA committed multiple violations of RCW 42.17.760. Stipulation, page 2.

REQUEST FOR RELIEF

WHEREFORE, the plaintiff requests the following relief as provided by statute:

1. For a civil penalty against the defendant in an amount to be determined at trial.

2. For an award of treble damages, if the violations are proven to be intentional.

3. For all costs of investigation and trial, including reasonable attorney's fees;

4. For injunctive relief; and

5. For such other relief that the Court deems appropriate.

DATED THIS *9th* day of October, 2000.

CHRISTINE O. GREGOIRE
Attorney General

//s//
STEPHEN T. REINMUTH
Assistant Attorney General
WSBA No. 18343

//s//, for
NANCY J. KRIER
Assistant Attorney General
WSBA # 16558

Attorneys for Plaintiff

BEFORE THE PUBLIC DISCLOSURE COMMISSION STATE OF WASHINGTON

IN THE MATTER OF THE ENFORCEMENT ACTION AGAINST Washington Education Association, Respondent.	CASE NO. 01-002 STIPULATION OF FACTS, VIOLATIONS AND RECOMMENDATIONS

The Washington Education Association (Respondent) and Public Disclosure Commission Enforcement Staff (Staff) agree to the following:

1. The Respondent is a labor organization.
2. The Respondent deposited into its general fund agency fee money from 4,194 individuals.
3. The Respondent's general fund money was used to make contributions and expenditures to influence an election and to operate a political committee.
4. The Respondent did not have affirmative authorization from agency fee payers to use their money for these purposes.
5. The Respondent contends that the number of 4,194 is over-inclusive in that it includes persons who were members of WEA and did not pay agency fees.
6. Staff contends that when Respondent submitted documents in response to a subpoena, a redacted list of 4,407 agency fee payers was presented. Names of the agency fee payers were redacted and replaced with a unique identification number for each agency fee payer. Of these, 4,407 individuals, 213 either filed objections or challenges to their

funds being used for 'non-chargeable' expenditures and received a refund of the portion of their fees being used for non-chargeable purposes. The funds from the remaining 4,194 individuals were then transferred from the agency fee escrow account to WEA's general operating fund.

7. Staff were unable to determine the amount of agency fees used to make the contributions and expenditures referred to in paragraph 3 because WEA's final revenue figures for FY 2000 (September 1, 1999 through August 31, 2000) are not yet available.

Violation

Respondent and Staff agree that Respondent committed multiple violations of RCW 42.17.760.

Recommendation

Staff recommends that this matter be referred to the Office of the Attorney General for further review pursuant to RCW 42.17.395(3). Respondent does not oppose the recommendation by staff.

Respectfully submitted this 25th day of September, 2000.

//s//	//s//
Vicki Rippie, Executive Director	Harriet Strasberg, Counsel
PDC	WEA

FILED
FEB 23 2001
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, ex. rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, Plaintiff, v. WASHINGTON EDUCATION ASSOCIATION (a Washington Non-Profit Corporation), Defendant.	No. 00 2 01837 9 DEFENDANT'S AMENDED ANSWER AND AFFIRMATIVE DEFENSES

COMES NOW Washington Education Association (hereinafter "WEA"), by and through its attorneys, Judith A. Lonnquist, Harriet Strasberg and Aimee Iverson, and hereby submit Defendant's amended answer, admitting, denying and alleging as follows:

1. Defendant admits that the Washington State Public Disclosure Commission (Commission) was established by RCW 42.17.350 and is charged by RCW 42.17.360–.370 with, *inter alia*, the responsibility of enforcing RCW 42.17.760. Defendant admits that the Commission office is in Olympia, Washington. The Defendant admits that the Commission investigated a complaint against Defendant. Defendant admits that the

Attorney General received a citizens' complaint letter against Defendant pursuant to RCW 42.17.400(4). Defendant admits that the Commission referred this matter to the Attorney General pursuant to RCW 42.17.395(3) for review. The Defendant denies the remaining allegations contained in Paragraph 1.1.

2. Defendant admits the allegations contained in Paragraph 1.2.

3. Defendant admits the allegations contained in Paragraph 2.1.

4. Defendant admits the allegations contained in Paragraph 2.2.

5. Defendant admits the allegations contained in Paragraph 3.1, and affirmatively states that it did not use agency shop fees to make contributions or expenditures to influence an election or to operate a political committee.

6. Defendant admits that WEA, through its legal counsel, signed a "Stipulation of Facts, Violation and Penalty" in the Commission case *In the Matter of the Enforcement Action Against the Washington Education Association, Respondent.*" Case No. 01-002 ("Stipulation"). Defendant admits that a true and correct copy of the Stipulation is attached to the Complaint. Defendant admits that upon accepting the Stipulation, the Commission voted unanimously to refer the case to the Attorney General's Office because it found an apparent violation of RCW 42.17.760, based on actual violations agreed to in the Stipulation. Defendant denies the remaining allegations contained in Paragraph 4.1.

7. Defendant admits the allegation contained in Paragraph 4.2.

8. Defendant admits the allegations contained in Paragraph 4.3.

9. Defendant admits the allegations contained in Paragraph 4.4.

10. Defendant admits that it collects agency shop fees from agency shop fee payers but denies that the number is 4,407. Defendant admits that a portion of these funds is deposited in the WEA's general treasury and denies the remaining allegations contained in Paragraph 4.5

11. Defendant admits that during the past five years, it has expended funds from its general treasury for contributions and expenditures to influence an election or to operate a political committee. Defendant denies the remaining allegations contained in Paragraph 4.6.

12. Defendant admits that it stipulated that it did not have affirmative authorizations from agency fee payers to use their money to make contributions and expenditures to influence an election or operate a political committee from September 1, 1999 to August 31, 2000, and affirmatively states that it did not use their money for such purposes. Defendant denies the remaining allegations contained in Paragraph 4.7.

13. Defendant admits that it agreed that it committed multiple violations of RCW 42.17.760, but only from September 1, 1999 to August 31, 2000. Defendant denies the remaining allegations contained in Paragraph 5.1. Defendants [sic] note that Paragraph 5.1 sets forth legal conclusions that are not answerable herein.

WHEREFORE, Defendant request [sic] that the Plaintiff's Complaint be dismissed with prejudice.

By way of further answer, the Defendant asserts the following affirmative defenses:

1. Plaintiff's Complaint is barred by the doctrine of laches and/or statute of limitations.

2. RCW 42.17.760 is unconstitutionally vague and therefore void.

3. Defendant's actions are consistent with, in reliance upon and justified by a complex process required under federal law and by the terms of a Settlement Agreement. Federal law and the Agreement require the Defendant to escrow agency fees and to give agency fee payers the opportunity to request and receive a rebate of certain funds. Although deposited in the general fund, agency fees are not expended to influence elections or for a political committee.

4. Any violation alleged to have been committed by Defendant was unintentional.

5. Defendant contends that it did not violate RCW 42.17.760. Confronted with what it believed was a misinterpretation of law by the agency and in the absence of any agency guidelines, in order to access the courts and properly frame the legal issues for court review, Defendant entered into the above-referenced stipulation based on the agency's interpretation.

6. To the extent that the agency fees were maintained in an escrow account, these funds were not available for use as contributions or expenditures to influence elections or to operate a political committee.

7. Since Defendant's end-of-year general fund balance exceeded the amount of agency fees collected, no agency fees could have been used as contributions or expenditures to influence elections or to operate a political committee.

8. Defendant made its election-related expenditures from its reserve, which did not contain agency fees.

9. Plaintiff's Complaint is barred to the extent that it exceeds the scope of the citizen's complaint.

WHEREFORE Defendant requests that it recover its costs and disbursements contained herein, including their reasonable attorneys' fees.

Dated this 23rd day of February, 2001.

//s//
JUDITH A. LONNQUIST, WSBA #06421
Attorney For Defendant

//s//
HARRIET STRASBERG, WSBA #15890
Attorney for Defendant

//s//
AIMEE IVERSON, WSBA #28610
Attorney For Defendant

The Honorable Gary R. Tabor

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

State of Washington ex rel. Public Disclosure Commission, Plaintiff, v. Washington Education Association, Defendant.	No. 00-2-01837-9 PLAINTIFF'S SUPPLEMENTAL TRIAL BRIEF

COMES NOW Plaintiff, by and through its attorneys, Christine O. Gregoire, Attorney General, D. Thomas Wendel, Assistant Attorney General, and Richard A. Heath, Special Assistant Attorney General, and respectfully submits the following arguments and authorities for the May 14, 2001 trial in the above-captioned matter:[1]

Defendant WEA argues in its trial brief that the costs of internal political communications made by it to its members are not considered contributions to a candidate or political committee, and, therefore, they cannot be considered expenditures under RCW 42.17.760. Defendant's argument ignores the plain language of RCW 42.17.760 which covers "contributions *or* expenditures." Its argument also ignores the definitions of "expenditure" and "contribution" in RCW 42.17.

[1] Incorporated by reference is all prior briefing by Plaintiff.

RCW 42.17.020(19) (copy [not] attached) defines "expenditure" to include "a payment, contribution, subscription, distribution, loan, advance, deposit, or gift of money or anything of value . . . ." Thus, a "contribution" is but one subset of "expenditure." Expenditure also includes a "payment" as well as numerous other items. Defendant's argument would make "expenditure" a subset of "contribution," and would read the word "expenditure" out of the statute. Furthermore, and in contrast to the definition of "contribution" (RCW 42.17.020(14) (copy [not] attached), the definition of expenditure does *not* exclude internal communications.

The WEA also attempts to avoid the plain language of RCW 42.17.760 by claiming that "expenditure" as used therein is limited to "independent expenditures which must be reported to the PDC. First, the language in the statute is not so limited, and secondly, there is a separate definition in RCW 42.17 for "independent expenditure"; RCW 42.17.020(24). "Independent expenditure" is not the term used in RCW 42.17.760, the term used is simply the broader term "expenditure."

When the WEA makes a payment to cover the costs of an internal political communication it is making an expenditure. If it is the type of political expenditure covered by RCW 42.17.760, and agency fees are used, affirmative authorization is needed. For example, if the WEA pays to produce and distribute a publication to its approximately 64,000 members which endorses certain candidates for election to the legislature it would be doing so to influence the election. Regardless of whether the WEA would have to report this internal expenditure of funds to the PDC as a contribution to the candidates, the lack of a reporting requirement does not mean the

WEA did not expend funds to influence the election of those candidates.

The purpose of RCW 42.17.760 is clear on its face. A non-member's fees cannot be used to influence an election without that individual's affirmative authorization. Defendant's asserted interpretation reads that requirement entirely out of the statute.

Non-members have no say in who the WEA endorses for election, or what position the WEA will support on ballot initiatives. In recognition of this situation, and in furtherance of non-member's First Amendment rights, RCW 42.17.760 requires affirmative authorization from each individual fee payer before their fees can be used for such purposes.

Defendant argues that it has core political free speech rights that would be infringed were it required to obtain affirmative authorization before it could use non-member agency fees to influence how its members vote in an election. That argument is wrong for at least two reasons.

First, the WEA's argument ignores the non-member agency fee payer's First Amendment rights not to have their fees used to fund political expenses. All of the case law previously cited in this case demonstrates that such rights must be protected. *See Hudson, Abood, Street, Hanson, Powerhouse.*

Secondly, the WEA is not inhibited in its ability to attempt to influence its membership through internal communications. It can use its member's fees for these purposes, or the fees of nonmembers who affirmatively assent.

In conclusion, RCW 42.17.760 covers more expenditures than just those required to be reported to the PDC as contributions. Defendant's interpretation to the contrary is not warranted by the plain language of the statute or the case law.

Respectfully submitted this *12* day of May, 2001.

CHRISTINE O. GREGOIRE
Attorney General

//s//
D. THOMAS WENDEL, WSBA #15445
Assistant Attorney General

//s//
RICHARD A. HEATH, WSBA #808
Special Assistant Attorney General
Attorneys for Plaintiff

WEA v. PDC Excerpts from Trial Record
and Injunction Hearing[2]

(Page numbers refer to the report of proceedings
of the trial held May 14–18, 2001, except as noted.)

* * * * *

THOMAS HEDGES

[39]

9 Q. Will you please state your full name.

10 A. Thomas Albert Hedges.

11 Q. Your employment position, sir?

12 A. Washington Education Association as Chief Financial

13 Officer.

* * * * *

[40]

16 Q. Do you have responsibilities -- let's talk about your

17 job as the Chief Financial Officer. Why don't you

18 give us a broad brush description of those

19 responsibilities, please.

20 A. I have responsibility for overseeing the accounting

21 and membership operations, the technology operations,

22 human resources and business, other business services

---

[2] All mistakes in the original transcription have been retained; they may or may not be indicated with "[sic]".

for the Association, plus preparing an annual budget for the Board of Directors to adopt and reporting to them on an annual basis with regard to the accounting

[41]

of the Association.

Q. So you report to the board?

A. Yes.

Q. Do you report to other officials in the organization?

A. My first line of supervision is to the Executive Director.

Q. Who within the Association has the authority to sign checks?

A. The Executive Director.

Q. Do you have that authority also?

A. Yes, I do, in his absence.

Q. Anybody else in the Association have the authority to sign checks by the Association?

A. No, sir.

Q. So it's you, you and Mr. Seibert?

A. Yes.

Q. Are you aware as to whether that is something that is

provided by the constitution or by-laws?

A. No, I'm not.

Q. As the Chief Financial Officer, do you have a responsibility to ensure that the record keeping and the financial structure of the organization is designed to comply with applicable laws?

A. Yes.

Q. That those structures are designed to be able to show,

[42]

demonstrate the compliance with applicable laws?

A. Yes.

* * * * *

[52]

Q. And when you write checks, let's talk about the sweep process. Why don't you describe that how that works in the interaction between the reserve account and the Bank of New York and the Bank of America checking accounts.

A. We have an obligation with the Bank of New York to maintain a minimum balance, which I believe is

$175,000 in the checking account. Depending how many checks have been written, that amount will be swept, if you will, from the Bank of New York account to maintain a sufficient balance to honor those checks as represented.

Q. You have standing instructions, don't you, to the Bank of America and the Bank of New York to do a daily reconciliation between those accounts?

A. Yes.

* * * * *

[53]

Q. Transfers are made on this basis, pursuant to the standing arrangement between the banks, this sweep occurs on a daily basis and as a result transfers are made from the Bank of New York reserve account to the Bank of America checking account frequently, right?

A. Well, I think in your diagram here there's a small box that indicates 65 to 75 annual sweeps, and that's my

best guess of a reasonable number that would occur.

* * * * *

[54]

Q. And over the years that escrow account has been handled in different ways to your knowledge, right, in the sense of how much is escrowed?

A. The calculation of the amount to be placed into escrow has changed in the last two years.

Q. Okay. And I guess I kind of jumped over the part of what we're escrowing.

What -- is it your intent or the Association's intent to put into escrow in the U.S. Bank account?

A. We place into escrow an estimate of the amount of fees that agency fee payers would be paying on a monthly basis to all levels of the Association.

Q. And you said that that had changed in the last couple of years?

A. That is correct.

Q. Why don't you describe your knowledge of the history of what has been escrowed for fees.

A. Again my history will go back to January 1st of 1997 when I was employed by the Association. For the first two years of my employment there the amount to be placed into escrow was based on the number of challengers and objectors we had for the previous reporting period, plus an estimate for some growth to maintain an acceptable level going into the escrow to

[55]

represent what fees they would be paying. The last two years we have modified that number to include all agency fee payers not just challengers and objectors.

Q. I don't know if we have access to a tear sheet, perhaps after the break. It might be easier to illustrate, but what I'm hearing you say is we might need to go through a few steps.
You have on the order of 3,000, 4,000 fee payers every year within the state of Washington under WEA's umbrella, right?

A. Correct.

Q. And you go through a process every year where you inform the fee payer how their money is going to be spent if they don't object, right?

A. Yes.

Q. And then if they do object you give them a refund, or if they challenge you give them a refund, right?

A. That is correct.

* * * * *

[59]

Q. All right. So, on Exhibit 157, we're dealing with the WEA escrow account which was intended to represent some reserved fee payer money. Every year you go through this process and you issue refund or rebates, which do you call it?

A. Refunds.

Q. To objectors and challengers that would otherwise be spent, and then what happens to the escrow account?

A. The escrow is relieved of the amount of money that has

been deposited once the challengers and the objectors has been refunded their calculated 12 month refund.

Q. Okay. So, now those refunds are not actually written on checks from U.S. Bank, are they?

A. No, they're not.

Q. And as we see on the bottom left of Exhibit 157, is it accurate that those checks are actually written under the Bank of America account?

A. Yes, it is accurate.

Q. And so first you write the checks and then that money is sitting in the escrow account; is that right?

A. Yes, it is.

Q. And after the checks are written it goes back to the

[60]

Bank of New York reserve fund, the escrow account does? When the U.S. Bank escrow account is relieved it does flow back into the Bank of New York account.

A. Okay.

Q. You call that zeroed out?

A. It depends on what time of the year you're talking about. We will typically make a refund to challengers and fee payers of the first mailing of the Hudson notice in December or January, and we will only relieve the escrow account for those numbers of individuals who have received the refund at that point in time, and there will be a balance maintained there pending completion of the second notice, Hudson notice.

* * * * *

[125]

Q. Prior to Public Disclosure investigation which began during the summer of 2000, August or September, you were never aware of the existence of 42.17.760, were you?

A. That is correct.

Q. To your knowledge, Washington Education Association has never before the summer of 2000 when the PDC began investigating, considered any measures specifically

for the purposes of implementing requirements of RCW 42.17.760, have they?

A. I have not been involved in any conversations about that.

* * * * *

[134]

At the top there the WEA clearly indicates as identified as the Bank of New York, are there any other forms of revenue that go into that account aside from the WEA dues and fees that are identified on the left there?

A. Yes, there are.

Q. And can you explain what those are, please?

A. We have miscellaneous income that comes to the Association, we have grants from organizations outside the Association, we would have miscellaneous reimbursements for either materials that our Association would be selling to members or the general public, or courses and classes that the Association may conduct that would be going into the Bank of New

15 York account.

16 Q. So is it fair to say in addition to dues and fees any

17 other dollars that comes into the Association goes

18 into that account?

19 A. That's correct.

20 Q. Now, with respect to the bottom of the chart there the

21 WEA, what's been identified as the WEA sweep account

22 with Bank of America, are there any other expenditures

23 that come out of that account?

24 A. Yes. Every expenditure that the Association would

25 make would come out of the Bank of America account.

[135]

1 That is the only checking account that we have for the

2 general fund of the organization.

* * * * *

THOMAS R. BAIER

[150]

12 Q. Would you please state your full name.

13 A. My name is Thomas Ray Baier.

14 Q. And by whom are you employed?

15 A. Washington Education Association.

Q. And what is your position?
A. Supervisor of Membership Systems.
Q. Can you describe your duties as Supervisor of Membership Systems?
A. Yes, I can. I coordinate the activities of WEA personnel who maintain records about individuals and about memberships.
Q. You say you coordinate, who do you coordinate with?
A. Other WEA staff.
Q. At the WEA headquarters or elsewhere?

[151]

A. Staff at both the headquarters as well as Uniserv offices.
Q. And that would be throughout the state?
A. Yes, sir.

* * * * *

[159]

Q. You're responsible for the book?
A. That's true.
Q. So somebody could ask to you create such a form and you could put that in this book?
A. Yes.
Q. And then instructions could be sent to the Uniservs or

whoever is filling this document out and say please present this to the agency fee payer and see if they will sign it?

A. It would have to be sent to not only all of the Uniservs but all our local associations. We have over 360 local associations and all of them run their businesses in different ways.

Q. But you could add such a form to your booklet with instructions like that?

A. Yes.

Q. Wouldn't be a problem?

A. No, it wouldn't be a problem.

* * * * *

[174]

Q. And you had mentioned there are four levels of dues; is that correct?

A. Yes.

Q. And that's pursuant to unified membership requirement; is that correct?

A. Yes, there's -- in the governing documents for I believe both NEA as well as WEA and other association

affiliates, there is a provision which we refer to as

[175]

unified dues, meaning that basically if someone is a

member of the Association they are a member of the

Association at all levels to all affiliates.

Q. And so there are essentially four dues deductions made

for employees, correct?

Let me rephrase that. All employees would pay

the same or have the same deduction made for their NEA

dues and their WEA dues or fees?

A. Their core dues would be the same.

Q. And then their local and Uniserv dues may vary

depending what particular council or local they belong

to?

A. Correct.

Q. And then with respect to a person's FTE status, is

there a further stratification depending on their FTE

status?

A. Yes, there is. There's actually significant

complexity in that area, because WEA, for instance,

makes provision for there to be a dues break for members who work less than two-thirds time but more than one-third time. Those members pay half WEA dues. Employees who work a third time or less pay one-third WEA dues. Unfortunately, while the breaks for WEA based on FTE are at one-third and two-thirds FTE, the breaks for NEA are made at one-half and one-quarter.

[176]

And likewise, there are other models in place at Uniserv Council as well as other associations, so it is a rather complicated matrix to figure out what part-time Association members pay because each separate entity of the Association, each affiliate and state affiliate and local affiliated that has its own sets of governing documents and its own independent democratic association.

Q. And you'd been asked some questions on direct about having the anticipated agency fee payer fill out the

agency fee form; do you recall that?

A. I recall talking about the agency fee form.

Q. And there was -- now with respect to making deductions on behalf of agency fee payers, would there be any affect on your membership system or your APA administration if there was a differing amount that fee payers, that various fee payers were required to or were affiliated on behalf of some fee payers and not others?

A. Yeah, it would basically double the complexity of what is already a pretty complicated system. We deal with about 300 different school district employers in the state of Washington, and, as I mentioned, their willingness and even technical ability to help us with membership and dues collection issues varies widely.

[177]

Not all school districts, like local associations, neither can be easily generalized or categorized or

painted broadly. School districts differ broadly in the -- only in their willingness or ability to help us but also in the technical tools that they have available to do so. Payroll offices vary in what kind of software they use, what kind of hardware they use, how many given payroll slots they have available, how many different amounts they're allowed to charge in a given payroll slot. So changing -- if what you're asking is if fee payers remitted a different amount than the core dues that that would be challenging, it would be considerably more than challenging not only to the Association but also the school district payroll offices.

* * * * *

[187]

Q. -- with your answer? Sorry.

And earlier I'd asked you some questions about effects various actions or designations or actions would have upon the complexity of the APA system; do

you recall those questions?

A. Yes.

Q. And I'm not sure I was clear when I asked the question initially, but with respect to fee payers, if some fee payers or district were asked to set an amount for fee payers and a different amount for other fee payers, would that have any affect upon the complicity of the system?

A. Oh, yes, that could be very difficult to administer because in many cases, you know, the membership staff who are responsible for tracking, for tracking dues and tracking membership, we simply don't have. I'm not sure that we would have the tools or the data structures available to accurately administer something like that. It would be very difficult certainly for not only the Association but also for school districts

Q. And is that cooperation or compliance with that system be anything you could unilaterally impose upon school

25 districts?

[188]

1 A. Certainly not.

* * * * *

[203]

18 Q. Are you testifying that it's not -- did I understand

19 your testimony, and you can tell me if I'm wrong, in

20 answer to Mr. Gawley's questions that it would be

21 extremely difficult to in light of the fact that you

22 have all of these other dues categories here to add

23 one more dues category?

24 A. But it wouldn't be adding one more, it would be adding

25 more for every single one of these. My understanding

[204]

1 from Mr. Gawley's question earlier was related to

2 deducting different core dues amounts for fee payers

3 from those core dues amounts currently deducted for

4 members. So you would be, in effect, it would be in

effect double this matrix. It wouldn't be adding one more category, it would be adding six more categories.

Q. Are you saying it can't be done?

A. No, I'm not saying it can't be done.

* * * * *

[206]

Q. There's been no indication to you at least that the person who's filling the agency fee payer form out talk or be instructed to talk to the agency fee payer and to ask them whether they wish to have their fees used for to support a or for a -- to operate a political committee or to influence an election?

A. I haven't had a conversation like that with anyone.

Q. If you were -- if the WEA decided as a matter of policy that it was going to refund money to all fee payers at the end of a year, would they come to you for information about who those people are?

A. Not to me directly. The best source of that information would be the people who are maintaining

the memberships, the membership records for the given
local association.
Q. But you would have a computerized record at least of
who was paying agency fees during that -- under the
current system at least?
A. There would be a computerized record for someone who

[207]

is an agency fee payer. It may not include all levels
of the fees being paid.
Q. But if the WEA Executive Director said to you, "I want
to give a refund of three dollars to every agency fee
payer, can you tell me who they are and how much
that's going to cost me," would you use your database
for that?
A. There would be a lot of manual calculation involved.
Q. But you could do it?
A. Membership staff would be able to gather data that
would facilitate that kind of a request.

Q. I'm only referring to the current year in that question.
A. I don't think that changes my answer.
Q. It would still be partly a manual process?
A. Yes.
Q. And that's because you haven't maintained the records in that way that would allow you to do that or because that's the only way you can do it?
A. It's a combination. Local associations again are independent entities and do not provide us with their dues structure with sufficient lead time that we're capable of tracking local dues on a computerized record. The same thing holds true for many Uniservs. The computerized membership record does not always

[208]

contain the financial information about local Uniserv dues.
Q. But it does have it for the WEA dues?
A. For classified personnel it does not because classified fee payers, the dues structure is percentage based, it is not a fixed amount, so it

would be manual calculation for every classified individual.

Q. At least that's the way -- that's the way the records are currently maintained?

A. Not only the record maintenance, but also the dues structure and governing structure of WEA.

* * * * *

KATHRYN O'TOOLE

[212]

Q. Good morning. Would you please state your name.

A. My name is Kathryn O'Toole. I prefer to be called Kathy.

Q. All right. Can I call you Ms. O'Toole?

A. Yes, please.

Q. Ms. O'Toole, what is your occupation?

A. I'm a lawyer.

Q. Where are you employed?

[213]

A. At the Washington Education Association.

Q. And during the 1990s where were you employed?

A. The Washington Education Association.

Q. What was your title during that period of time?

A. I had two titles in the 1990s. One was General

Counsel and the other was Special Counsel.

* * * * *

[232]

So what would happen here is if a fee payer didn't follow the instructions provided above, that deadline

[233]

instruction within those 30 days and fill out their own piece of paper or form of communication, they would lose their opportunity to object?

A. Not exactly. First of all, all they -- we didn't require them -- we didn't -- if we got one that didn't state, you know, all the things listed there 1 through 5, we didn't state this is no good, okay? All we needed is notice from them that they wanted to object or challenge and we would send the rebate once -- once we knew that this person did not want their fees used for nonchargeable items. And there is a second mailing, this is the first mailing. We know by the end of June who all the agency fee payers in a particular school district are. And we

send the Hudson mailing out in August because the courts require that 30-day time period to think it over. So that means we're relying on old information because when the paycheck deductions start at the end of September, there will be a lot of new employees in every school district, and so we have a second mailing we send out typically in December where anybody's name that we have from whom we are collecting funds from and we don't have a membership form, we consider those people agency fee payers and we send them a second mailing, give them another 30 days, send the refunds,

[234]

rebates to those people sometime in January.

* * * * *

JAMES S. SEIBERT

[254]

Q. Would you please state your name.

A. My name is James, middle initial S., Seibert.

Q. Your employment position?

[255]

A. Executive Director of the Washington Education Association?

Q. For how long?

A. Since January of 1988.

* * * * *

[259]

Q. Now, you're not aware, are you, of any fee payer who has ever come forward and affirmatively auth rized the expenditure of his or her fees for the purposes identified in 42.17.760?

A. I am not.

* * * * *

Q. Were you aware that the Washington Education

[260]

Association admitted in September of this year to multiple violations of RCW 42.17.760?

A. Yes.

Q. Are you aware of anything the organization, the Association has done since that time in order to obtain affirmative authorizations from individual agency fee payers?

No.

* * * * *

Q. I'd like to show you what's been marked as Exhibit 1 and direct your attention, I'm sorry, I'll look at it with you, to Paragraphs 3 and 4. Would you read those, please?

* * * * *

Q. You see here that the Washington Education Association is the respondent?

A. Yes.

Q. Were you aware of and did you authorize entry into this stipulation?

A. I was aware of it. It was authorized by the Board of Directors.

Q. And it says here, it talks in Paragraph 2 about the deposition into the general fund fee money from 4,194 individuals; do you see that?

A. Yes, I do.

Q. And you don't disagree with that, do you?

A. No.

Q. That was done in every fiscal year from '94/95 to the

[261]

[262]

present, not the same number of people but the process?

A. To the best of my knowledge.

Q. And Paragraph 3 it says, "The general fund money was used to make contributions and expenditures to influence an election and to operate a committee."

That was a true statement, was it not?

A. Yes.

Q. And that was a true statement for the years 1995/96 up to and include the present, is it not?

A. I think, yes, it was.

Q. And in Paragraph 4 it says, "The respondent did not have affirmative authorization from agency fee payers to use their money for these purposes." That is a true statement from the fiscal year 1995/96 to the present, is it not?

A. Yes.

Q. I'd like to take a few minutes and go over some of the exhibits we have with you, some others I should say.

May I have Volumes 3 and 4, please.

While I'm getting these out, you have had some involvement in the what we've come to call the Hudson process every year during your tenure, haven't you?

A. I've been -- I know about the Hudson process. When you say some involvement, I'd like you to be more

[263]

specific.

Q. I will try to. I'd like to show you Exhibit 26 in Volume 4. Let's go to Exhibit 27. That's Volume 3, is it? Sorry. We're on Exhibit 27. You see the first page there? There is some handwriting towards the right in the upper portion, appears to say J.S. Seibert?

A. Yes.

Q. That is your signature?

A. Yes, it is.

Q. Let's take a look at Exhibit 28. Can you turn to that tab?

Again, your signature?

A. Yes.

Q. Exhibit 29?

A. Yes.

Q. Your signature?
A. Yes.
Q. And back to Exhibit 26, your signature also?
A. Yes.
Q. All right let's turn back to Exhibit 27 and spend a few minutes on that.
Now, first of all, without reading the letter if you can do so, I'd like you to say why it is you send this letter to fee payers with the attachments.

[264]

Did you hear the question?
A. No, sorry.
Q. Why is it that you send these letters to fee payers?
A. Well, we're required to do that.
Q. Are you the author of the contents of this letter?
A. No.
Q. You sign it?
A. Yes.
Q. Do you read it when you sign it?
A. Yes.
Q. So you're aware of its contents?
A. Yes.
Q. There is no form provided to fee payers, is there?
A. No.

Q. They have to, if we take a look at the second page of
Exhibit 27, at the top of that page there's a list of instructions, excuse me, third page, it says, "You may object by notifying James Seibert," et cetera, "at the following address," correct?
A. Yes.
Q. Has the Washington Education Association ever considered creating a form for this?
A. A form for agency fee payers to inform us?
Q. Yes.
A. Not to my knowledge.

[265]

Q. Do you see a little bit below the numbered items one through five it says, "If some written objection has not been postmarked by September 28th, 1997, you will waive your ability to object"?
A. Yes.
Q. Why is that deadline imposed?
A. Because we encumber huge sums of money waiting to find out whether these individuals will object or challenge, and so we have to set some deadline or --

at some point in the process or it could just go on forever.

Q. Is -- are you aware of what the effect is if somebody objects or challenges?

A. Yes.

Q. They get a refund, don't they?

A. Yes.

Q. Objectors get a refund right away and challengers, don't they?

A. They get, yes, they get a refund right away. Challengers can get an additional refund later on if the arbitration indicates that their challenge is sustained.

Q. And if an objector objects and does not challenge, the objector won't get an additional refund; is that right?

[266]

A. That's my understanding.

Q. And if neither objects or challenges they couldn't get a refund at all; is that correct?

A. That's right.

* * * * *

Q. We were talking about the Hudson packet and

objections, and isn't it true that you would hope that
a nonmember, a fee payer, would not be able either in
response to a Hudson packet or unprompted say to the
Association, "Make me a permanent objector, please,
and not have to object every year"?

* * * * *

A. My preference is to have every educational employee
make a decision every year as to whether or not they
wish to join the organization, become a member,
because I think we strive eternally to try to improve

[267]

the organization and attract those who may at some
point in their career decide they don't want to be
members to be members.

Q. So it would be your preference not to allow nonmembers
to be permanent objectors?

A. Yes.

* * * * *

[268]

Q. I'm curious if you can say why it doesn't say at the beginning of this letter, "If you send us an objection we'll send you a check or a refund"?

A. It's never been in any of the letters and I don't know why we haven't put it in there. I've never said don't put it in.

* * * * *

[269]

Q. Why don't you go ahead and recite in a reasonably concise fashion, if you can, your understanding of your job description.

A. I'm responsible for the implementation of the programs and policies that are adopted by the governing structure of the organization through the direction of the staff. I have responsibility for the overall employment of individuals, the work of the WEA.

[270]

Although I don't make each individual employment decision, those are my responsibilities. I have a responsibility for personnel matters, for

relationships with our employee organizations.

* * * * *

[328]

Q. What is the Citizens for Quality Education?

A. Citizens for Quality Education was a committee formed by a variety of groups who were supportive of public education.

Q. And do you know why they were formed?

A. They were formed to support Initiative 732.

Q. Which is what?

A. It was the initiative that required the State to provide cost of living increase to education employees.

[329]

Q. Why did WEA contribute substantial contributions to -- in support of that initiative?

A. Educational employees stood to benefit significantly if this initiative passed and significantly more than they have benefited in the last decade over funding for salary increases from the state.

Q. And would fee payers benefit from the passage of that

initiative too?

A. Yes, fee payers, all educational employees benefited from that.

Q. Does the Washington Education Association write checks for political candidates?

A. The Washington Education Association does not.

* * * * *

JEFFREY L. BALIBAN

[345]

A. Jeffrey Lee Baliban.

Q. Your occupation?

A. I'll [sic] an economist and a CPA.

Q. Would you please describe your educational background?

A. I have a Bachelor of Science Degree in Accounting that I received from Fairleigh Dickinson University in 1977. I've been a practicing accountant since then.

I received my -- I completed my CPA testing in 1981, and I hold a Master of Arts Degree in Economics from the University of Texas that I completed in 1995.

Q. Would you describe your experience, professional

[346]

experience?

A. I began my professional career again in 1977. I was with a firm known then as Ernst & Ernst which is now known as Ernst & Young. I was with them for about three years, maybe a little more. After that I was with a company called Campos & Stratus, which was a smaller boutique-type firm getting involved in economic damages issues and economic impact analyses, and I left there in 1999 and joined KPMG who I'm still with today.

Q. What is your position with KPMG?

A. I'm a partner with the firm. My current designation is partner in charge of the dispute advisory services sometimes known within the firm as forensic and [illegible] tion services.

* * * * *

[347]

Q. Thank you. Now, we've asked you to review some

materials and offer some opinions for this matter, and I'd like you to describe, please, if you could, what kind of information you reviewed in preparation for forming opinions for this case.

A. Well, basically I've reviewed deposition testimony, I reviewed the deposition testimony of Mr. -- I believe it's Seibert or Seebert (phonetic).

Q. We pronounce it Seibert.

A. That's one thing you can't get out of a transcript is the right pronunciation. I reviewed Mr. Seibert's, reviewed Mr. Hedge's deposition testimony. I reviewed Mr. Vanetta's deposition testimony, I think two volumes of Mr. Vanetta's deposition testimony. I reviewed Mr. Hedge's declaration. I reviewed exhibits and attachments to the various depositions and declarations including Hudson packets, Weekly Activity Report or at least examples of Weekly Activity Reports. I think that that is basically the information from which I'm drawing my opinions.

Q. Can you describe what you've learned about how the WEA fee payer accounting works from those records and

[348]

depositions?

A. Well, I've learned several things. I mean, I've learned about the Hudson process that the WEA goes through with regard to the fee payers. I've learned about chargeable and nonchargeable expenses. I've also read by the way the statute, what I've been calling statute 760 which is I think 42.17.760, I believe.

Q. Very good, yes.

A. I've learned the process that they go through, the WEA goes through in attempting to deal with the Hudson process and attempting to deal with objections from fee payers to the nonchargeable expenses. I've learned the source of their accounting information, that is, the Weekly Activity Reports and how they're

used. I've learned from the transcripts changes that have been made to their accounting processes and procedures since the advent of 760. That's it in general.

Q. I'd like to talk about some of the opinions I've asked you to provide for purposes of this case, and the first opinion I'd like to talk about is whether or not fee payer money was used for political expenses.

A. Okay.

Q. And I haven't asked you, have I, to actually audit the

[349]

records of the organization, correct?

A. That's correct, and I've not done so.

Q. And I've also not asked to you determine whether or not affirmative authorization was or was not obtained from fee payers to use their money for political purposes, right?

A. I haven't independently made any kind of a determination, that's correct.

Q. What I would like you to do is assume that there were expenditures from the Washington Education

Association's general fund and that there was no affirmative authorization obtained from fee payers to use their money for political expenditures. I'd like to ask your opinion, nevertheless, whether the Washington Education Association has used fee payer money for political expenses.

A. Based on what I know with regard to the accounting processes and the bank accounts that are used, based on what I know with regard to the Hudson process and the segregating of fee payer money and then the commingling of fee payer money, it's my opinion that once it's commingled to whatever extent political expenditures are made out of that commingled account, a proportionate amount of fee payer money is used

* * * * *

[362]

Q. All right. So again, is it your opinion whether the WEA used fee payer money to pay political expenses for -

the fiscal periods September 1, 1995, to the present,
excluding the present fiscal period where they've escrowed all of it?

A. Where they've escrowed all of it it's not commingled.
You can maintain the separateness of anything until you commingle it. Before I contribute it that separateness is maintained, but if you're telling me -- well I know that they have commingled the funds.
If you're telling me that political expenditures were made out of a commingled fund, then I will tell you that a proportionate share was paid for by fee payer money.
Now, if you're also telling me that affirmative authorization was not obtained to do so, then those expenditures were made without affirmative authorization.

* * * * *

[418]

Q. Now, you have -- assume you have a fund where there

are commingled funds and the organization wants -- of
dues and fees and other revenues, and the organization
wants to spend money for -- wants to use some of that
money for political expenditures, it's your view that
the only way they can do that because of your
proportionality premise is by having affirmative
authorizations, correct?

A. From the fee payers.

[419]

Q. From the fee payers?

A. I think that that's true.

Q. And that would mean that they would have to have
affirmative authorizations, as you use the term, from
100 percent of fee payers, correct?

A. From 100 percent of fee payers that contributed money
to that fund.

Q. In the hypothetical that's 100 percent?

A. If all fee payers put money into that fund.

Q. Right.

A. And you want to use money in that, along with other
dues payers and other revenue sources.

Q. Right.

A. And you want to use money out of that fund.

Q. Right.

A. It's my --

Q. For political purposes.

A. For political purposes. It's my opinion that unless you have the affirmative authorization to fee payers you can't do that without spending a portion of fee payer money.

Q. Every single affirmative -- every single fee payer has to give you an affirmative authorization?

A. Every single fee payer that contributed to that fund has to give you affirmative authorization.

* * * * *

[429]

Q. Now, you were asked a lot of hypotheticals dealing with what is effectively a cap on political spending. I'm curious, does your opinion foreclose a structure that would allow members to use their money in their

collective judgment as time goes on without a cap on political spending? Is there a way that could be allowed?

A. Oh, absolutely.

Q. Would you provide some examples?

A. Well, I think I said in response to Ms. Lonnquist's questions, she asked me to hone in on to the advanced reduction aspect of a way to comply with 760, and asked me to assume that there are all sorts of our accounting processes and procedures in place to assure compliance, and I assumed that. I also I think I said that that wouldn't be my first choice. What my first choice would be to do exactly what they're doing now with regard to the Hudson process and, that is, take all the fee payer money and segregate it out, separate it out. You can, if you receive affirmative authorization from some fee payers, you can contribute their portion to a general fund, but everybody else's you keep separate and you

only contribute as on a reimbursement basis to the
general fund to the extent you receive affirmative

[430]

authorization to do so. If you don't, you refund back
a portion of those fees.
Q. Are there other mechanisms that could be conceived of
as well that could avoid a cap on political spending
by the membership itself with its money?
A. Well, there are accounting methodologies that you
could use to try to use to separate out what's being
paid, but I would say that segregating the fee payers'
revenues would be the best. And then you can use the
dues payer funds in any way you like.
Q. And I think your fundamental opinions were, if I
remember accurately, to the extent my notes are
accurate, create an audit maker of expenditures, keep
track of those expenditures?
A. That's correct, I did say that, yes.
Q. Identify the fee payers who provide affirmative

authorization and those who don't?

A. You want to keep records. I think what I said was I want to keep records who are your dues payers, who are your fee payers that have provided affirmative authorization, and who are your fee payers who have not provided affirmative authorization.

Q. And I have, I don't know if it's --

A. You want to provide a good audit trail of what your expenditures are. You want to be able to reconcile

[431]

that to your financial statements. To whatever extent you have collected money and commingled, you'd want to make an appropriate rebate, a prompt rebate. But if you take the Hudson process as it is now which separates out the money and you proceed through the year without commingling that money and make whatever expenditures you want out of your fund, at the end of the year Ms. Lonnquist pointed out you're

able to look back and you're able to determine exactly how much was spent on political expenditures. To whatever extent you have affirmative authorization from fee payers, they can contribute on a reimbursement basis to that fund, to whatever extent that a fee payer does not give you affirmative authorization, you then know at that point exactly what proportion of every fee payer's dollar has been contributed or that every dollar that goes into the general fund has been used for political expenditures because you're looking back. After that's done you can contribute or, I'm sorry, you can rebate to the fee payer that portion of that relates to political expenditures, much like they do now with the Hudson process on a proportionality basis. The rest can be contributed to the general fund to reimburse the general fund for every other

[432]

expenditure in proportion to which it was spent.

Q. And that would allow, then, the emergency initiative to be dealt with as it arose under Ms. Lonnquist's hypothetical to you, would it?

A. You could use the general fund for anything you wanted to use so long as you didn't commingle the funds and you don't have fee payer money in there without affirmative authorization. Other than that, I'm not aware of any other statute that limits what you can use that money for.

Q. And is that kind of arrangement consistent with your opinion?

A. It is.

* * * * *

LEE ANN PREILIPP

[448]

Q. Would you state your name and spell your last name for the record, please.

A. Yes. Lee Ann Preilipp. Preilipp, P-R-I-E-L-I-P-P.

Q. And what is your occupation?

19 A. I'm the President of the Washington Education
20 Association.

* * * * *

[449]

17 Q. And do you supervise any employees?
18 A. That's not my direct venue. What I do is work on the
19 governing side.
20 Q. And who [sic] would you describe for the Court, please, what
21 the work on the governance side, what it is, what it
22 covers?
23 A. As the elected leader I work with other leaders in the
24 state who represent their local associations. I also
25 work with membership. We have approximately 70,000

[450]

1 members, and it's my job to carry through with what it
2 is that the members of the organization want to have
3 done.

* * * * *

[453]

1 Q. Do you believe that it is important to the interests

of educational employees that WEA be involved in politics?

A. Yes, it is.

Q. And why do you believe that?

A. Well, the situation is one of, in this state, that the funding and other issues related to our working conditions, where we work in our school settings, are decided by the legislature and other governing bodies and, therefore, in order to help make sure that we have made education the best it can be for our students and our staff we have to be involved with those who make those decisions.

Q. And how about ballot propositions, do you feel WEA must take a role with respect to that, some ballot propositions?

A. Yes. Those that affect, once again, the school employees, whether it's a statewide initiative such as 732 or 728, which were class size and cost of living adjustments, or school district level levies that affect the funding that goes on at the local level.

22 Q. And how are WEA's positions with respect to ballot
23 propositions formed?
24 A. Once again, that's done by the membership at different
25 levels. They determine either the Board of Directors

[454]

1 level or the representative assembly level how they
2 feel about various issues.

* * * * *

[463]

19 Q. Now, I want to return to your testimony about the
20 importance of participation in ballot propositions and
21 specifically refer you to school levies. Do you have
22 a position with respect to whether or not the
23 Association should be active in school levies?
24 A. I do personally, as well as a member of the
25 organization and leader.

[464]

1 Q. Why is that?
2 A. I taught in Federal Way School District for 26 years,
3 and at one point in time in the '70s we had I think 21

consecutive levy failures, and I know what it's like to teach when you don't have the extra funding in your school district. Everything from having to have a stack of buckets in the room for when the roof leaked when it rained, to not having enough text books or up-to-date text books or materials to use with the students, and it was all because we didn't have the extra funding that was needed to provide these.

Q. Do you know approximately what the statewide average starting salary for teachers is today?

A. $26,750.

* * * * *

KRISTEEN HANSELMANN

[480]

Can you please state your name.

A. Kristeen Hanselmann.

Q. And what is your current position of employment?

A. I'm the Director of Political Affairs for the Washington Education Association.

Q. And how long have you held that position?

A. Since 1999.

* * * * *

[491]

Q. Since 1995 have there been some major ballot propositions that WEA has participated in?

A. Yes.

Q. Which would you consider to be the major?

A. In '96 there was Initiative 173, 177, one which was a voucher initiative, the other which was a charter school. More recently, there was Initiative 732 which was cost of living for school employees, and Initiative 728 which was a reduction in class size initiative.

Q. And with regard to 173, which one was that?

A. That was a voucher initiative.

Q. And what position did WEA take?

A. We were part of a coalition that opposed that initiative.

Q. And why did WEA oppose the initiative?

A. It went to the heart of impacting funding for education and the possible loss of funding, transfer of monies to private entities thus putting at risk public education employment.

Q. Would the result of its passage have impacted members

[492]

and fee payers in the same way?

A. Yes.

Q. And did WEA make contributions to that initiative?

A. They made contributions to the No Committee on 173.

Q. Thank you. With regard to Initiative 177, what was

that initiative?

A. That was a charter school or independent school

initiative.

Q. And what position did WEA?

A. WEA was part of a coalition opposing that initiative.

Q. And why did WEA oppose Initiative 177?

A. It had the impact of defunding education and putting

at risk education funding for existing programs and

staff.

Q. And would this -- okay.

So it put it at risk funding for staff, is

that --

A. Yes, and program.

Q. And would this initiative if it had passed had

impacted public education?
I'm sorry. Would the result of this initiative if it had passed impacted the members and fee payers in the same manner?
A. Yes.
Q. Did WEA participate in opposing this initiative?

[493]

A. Yes, they did.
Q. With regard to Initiative 728, what initiative is that?
A. 728 was a initiative to reduce class size, enhance extended learning opportunities for kids and support and increase professional development for employees.
Q. What year was that on the ballot?
A. 2000.
Q. And what position did WEA take with regard to Initiative 728?
A. The organization supported it.
THE COURT: Counsel, I think we're going to stop at this time and take our morning recess. We'll be in recess for the next 15 minutes.
(A recess was had.)
THE COURT: Let's press on.

BY MS. STRASBERG:

Q. I believe we just finished with Initiative 728 when we took a break and I had not asked you about Initiative 732 with regard to you describing what that initiative was.

A. That was cost of living for school employees.

Q. What position did WEA take in that initiative?

A. WEA was supportive of that initiative.

Q. Okay. And why did WEA support that initiative?

[494]

A. Because it directly related to compensation for school employees and for higher education employees.

Q. And this initiative passed; is that correct?

A. Yes, it did.

Q. And is the result of its passage to result in cost of living increases for members and fee payers in the same manner?

A. Yes, it will, subject to collective bargaining.

Q. And did WEA make contributions to support or oppose – did WEA make contributions to support that initiative?

A. Yes, they did.

Q. Thank you. With regard to Initiative 728, that initiative -- the class size initiative, that initiative passed; is that correct?

A. Yes, it did.

Q. And how -- what is the impact of this initiative on public education and education employees?

A. There are a number of provisions relating to class size and conditions of employment regarding professional development, extended learning, all of which impact and have to be -- its impact has to be bargained at the local level around the utilization of those monies and how they are going to impact the working conditions of employees.

Q. And does the result of its message impact members and

[495]

fee payers in the same manner?

A. Yes.

Q. And with regard to local associations when they get involved in levies, how is their position on local levies determined?

A. That's determined at the local association level.

* * * * *

[524]

Q. And internal communications that are put together by the -- what kind of information is sent to members that would relate to political matters?

A. It could be information on an initiative that impacts education employees or education, it could be information on a candidate, it could be information that encourages people to become an absentee voter.

Q. Could it be also include information that would encourage members to vote for or against a certain ballot proposition?

A. Yes, it could.

Q. And could it be sample ballots that are premarked?

A. No. We have not utilized that particular form of communication in my tenure in this position.

Q. Could it be written endorsements of certain candidates for election?

A. We do not endorse candidates, we recommend, and we do

inform our members as to our recommendations. What they do with them is between them and their ballot.

Q. So that's regarded as an internal communication?

A. Yes.

Q. So that's not reportable anywhere to the PDC?

A. No.

Q. But money is spent for that purpose?

[525]

A. Money is spent out of the Community Outreach Program for that purpose.

Q. Solely out of the Community Outreach Program?

A. In -- yes.

Q. Are there newsletters that you send to your membership?

A. We do have the "WEA Action" and that is not out of the Community Outreach.

Q. Does that newsletter ever take a position on an initiative or candidate?

A. Yes, it does report the position the Board of Directors has taken.

Q. So there is money spent out of the general fund on that newsletter?

A. Yes.

Q. You testified that the position of the WEA on ballot propositions is ultimately decided by the WEA Board of Directors; is that right?

A. Yes.

Q. And that prior to recommendation being made to the board, how are those recommendations -- are recommendations made to the board by staff as to what positions it takes?

A. Generally the recommendation's for positions first, both to discuss to the executive committee of the

[526]

organization and a recommendation to support or oppose a ballot proposition generally goes from the executive committee. This is after they have received an analysis from staff, and it is not unusual for staff to make a recommendation for their consideration.

Q. In coming up with recommendations, do staff or the executive committee ever inquire of agency fee payers

how they would like to or what position they would

like to take on a particular ballot initiative?

A. To my knowledge, no.

Q. Now, you talked about specific initiatives in 1996, No

on 173 and No on 177, excuse me, Initiatives 173 and

177?

A. Yes.

Q. And in 2000 Initiatives 728 and 732?

A. Yes.

Q. And I think you said with respect to Initiative 173

that the WEA opposed that initiative?

A. Correct.

Q. So was there any attempt to find out whether agency

fee payers agreed with that opposition?

A. Not to my knowledge.

Q. Do you think that there would be agency fee payers

that would not have agreed with that position?

A. I assume that some of our members may not have.

[527]

Q. And could the same be said for Initiatives 177, 738

and 732?

A. Yes.
Q. Are there -- I think you testified Initiative 732 is a
COLA, cost of living increase initiative; is that a
fair -- I don't know how you refer to it.
A. COLA is fine.
Q. And you said it affected members and fee payers the
same?
A. Yes.
Q. Did Initiative 732 provide for an increase in pay for
all of your members?
A. No, it did not.
Q. Who did it exclude?
A. We represent some higher education faculty at
four-year institutions which are not subject to
collective bargaining and are under a personnel board
system which -- and are deemed state employees, and so
as a consequence we did have some members that were
not covered by Initiative 732.
Q. And so fee payers in those organizations also would
not be covered?
A. I don't believe there's fee payers in those

organizations because they do -- only one has collective bargaining rights and there's no agency

[528]

fee.

Q. If an agency fee payer wrote the WEA and said I don't like the position you're taking, what would the WEA do with that?

A. Generally, like all correspondence, we basically indicate that the organization has taken a position what they feel is in the best interests of the majority, on behalf of the majority of educators.

* * * * *

[540]

Q. We talked a little bit about WEA-PAC. Can you just briefly describe what WEA-PAC is and what it does?

A. WEA-PAC is a membership organization that members of the WEA can join and it is a PAC devoted to dealing with candidates, state and local candidates.

Q. And is it, WEA-PAC, the organization that recommends a candidate?

A. Yes, it does.

Q. Does WEA recommend candidates?

A. No, WEA-PAC does.

[541]

Q. And does WEA-PAC make independent expenditures?

A. Yes.

Q. And does WEA make independent expenditures?

A. No.

* * * * *

THOMAS HEDGES

[552]

Q. Mr. Hedges, when your office engages in the Hudson process membership is under you, all the entities that are under you reflect basically the reproduction and the mailing of the Hudson packets?

A. That's correct.

Q. When you mail those you don't get return receipts, do you, from the post office or from the recipient?

A. No, we do not.

Q. And, in fact, you often do receive a number of them returned to the WEA undeliverable, don't you?

[553]

A. Yes, we do.

Q. So you can't say for a fact that all fee payers even receive the Hudson packet, can you?

* * * * *

A. If your answer is follow-up to the ones that are returned undeliverable, we do follow a process to ascertain a more current address from the one that the original mailing was sent to.

Q. Let me ask another question. Are you able to say that there is not a fee payer out there who does not receive a Hudson packet?

A. The question sounded like a double negative to me.

Q. It was a double negative. Are you able to say every single fee payer in a given calendar year receives a Hudson packet?

A. 100 percent?

Q. My question is, yes, 100 percent.

A. No, I'm not.

* * * * *

[554]

Q. You receive no verification from fee payers as to whether or not they have received and read the packet, do you?

8 A. No.

* * * * *

[556]

25 Q. And with respect to the Hudson packets that come back

[557]

1 as undeliverable, could you explain in any more detail

2 what efforts are undertaken to follow up with those

3 packets to try and get them to the fee payers?

4 A. The -- any undeliverables from the first mailing would

5 be researched and those individuals would be included

6 in the second mailing. . . .

* * * * *

VICKIE RIPPIE

[559]

6 Q. Would you please state your name.

7 A. Yes. My name is Vicki Rippie.

8 Q. And what is your current position of employment?

9 A. I am the Executive Director of the Public Disclosure

10 Commission.

11 Q. And how long have you held that position?

12 A. Since May 15 of 2000.

Q. And what position did you hold prior to that?
A. From August of -- August 28th of '99 to May 12th I was the acting Executive Director.
Q. And can you describe what your current responsibilities are?
A. Yes. The Executive Director is responsible for the day-to-day operations of the agency. I am the public records officer in charge of implementing the Commission's positions and decisions. I am also in charge of the enforcement and compliance effort, the disclosure effort in terms of making sure that documents are filed with the agency, are prepared, available to the public, and we have a public

[560]

education component as well.

* * * * *

[569]

Q. And Exhibit 163 I need. Could you identify what's been marked as Exhibit 162, please?
A. Yes, this is a letter from Steven O'Ban to Attorney

General Christine Gregoire dated August 11, 2000, regarding Notice of Violation of Public Disclosure Act (42.17.760) by Washington School Districts and WEA.

Q. And is this the -- did this letter come to your attention?

A. It was referred to our office for investigation from the Attorney General's Office, yes.

Q. And do you know approximately when it was received by your office?

A. Within a matter of days is the best I can do of it being received by the Attorney General's Office which appears to be dated August 14.

Q. And this is the document which gave rise to the litigation that we're here about today?

A. This letter constitutes what we consider -- what we euphemistically call a 45-day letter that is also known as a citizen action that's being filed pursuant

[570]

to 42.17.400, yes.

* * * * *

MICHAEL E. GOCKE

[595]

Q. Would you please state your name and spell your last name.

A. Michael E. Gocke, G-O-C-K-E.

Q. Your occupation?

A. I'm a partner in the accounting firm of Moss Adams, LLP. I'm a Certified Public Accountant.

Q. Mr. Gocke, could you please describe your educational and experience background?

A. I completed a Bachelor of Science in Accounting at Sacramento State College in Sacramento, California, in 1969. I completed a Master of Business Administration from Pacific Lutheran University in 1980. I completed a Master of Science in Taxation from Golden State University in 1984. I've been a Certified Public Accountant since 1973, and therefore each year have had continuing education requirements since 1973.

I've also have continuing education requirements as a
Certified Financial Planner since 1984, and as a
business appraiser. I hold a business appraisal
designation, a ABV, from the American Institute of

[596]

CPAs, and each of those has some annual continuing
education requirement.

Q. All right. Thank you.
Now, you were asked -- contacted initially by the
Washington Education Association concerning some
potential involvement in this case or your firm was;
is that right?

A. Correct.

Q. And then at a later time you were contacted by the
Office of the Attorney General?

A. Irene Cox of your office, if I recall.

Q. And you understood that the purpose of those contacts
were for a potential joint retention by the parties;
is that right?

A. Yes, sir.

Q. And ultimately you were told that the parties reached an agreement for a joint retention of your firm for purposes of this case; is that correct?

A. Correct.

* * * * *

[623]

THE COURT: I have no idea what bottom of the pool is, so you can clarify that?

MR. WENDEL: Explain that.

MR. GOCKE: Your Honor, what we had discussed was that if you looked at the nonchargeable activities that had been reviewed each year, with this as a byproduct of this Hudson rebate process, and the arbitrators had determined how much was chargeable, how much was nonchargeable, that if you look at the dues income, not the agency fee income, and if that dues income was greater than the amount of the nonchargeable activity, then none of the political activities could have been spent on -- from agency fee sources because the nonchargeable activities would have, in effect, been paid out of the dues income.

So the bottom of the pool as the question was phrased, is in effect what remains. And if you recall, I had testified that the political activities are actually a subset of the nonchargeable activities, so if the dues income exceeded the total amount of the nonchargeable activities, then it could not -- the

[624]

political activities could not have been paid out of agency fee sources.

* * * * *

Q. And what that assumes, see if I'm understanding that correctly.

A. This is the two pie theory?

Q. Right. We have a dues.

THE COURT: Are the pies going into the pool, is what you want to know?

Q. Soggy pies. So we're going to call the category of expenses chargeable, and we're going to call category of expenses nonchargeable, okay?

A. Correct.

Q. And we have a pie, and I don't pretend to be drawing a pie to scale or using actual percentages here, your

bottom of the pool theory says that some percent, let's say 75 just strictly for the sake of example, of a dues payers dollar is going to chargeable, and 25 percent of that dollar is going to nonchargeable,

[625]

right?

A. Well, at first blush it would look that way but you then have to factor in that some of the agency fee payers object and they obtain a refund of the nonchargeable portion and so that changes your pie slices slightly.

Q. What my question is the fee payers that don't object --

A. Correct.

Q. -- under your bottom of the pool theory if you've got enough chargeable expenses, chargeable expenses that exceed the amount you receive from nonmembers or fee payers, then you can apply 100 percent of the fee payer's dollar to the chargeable expenses?

A. In effect that's what occurring.

Q. Okay.

A. The equity of that is, that's a different question, but that's in effect what's occurring.

Q. And you're not offering an opinion that that is an equitable result?

A. I wasn't offering an opinion one way or another in terms of equity.

* * * * *

[628]

Q. Okay, you're right. Why did you propose that alternative?

A. Well, we thought it was a way of ascertaining fairly quickly and relatively inexpensively whether or not it appeared that there was a problem with potential political expenditures being paid out of the agency fees, and it was the type of test that could be done in several hours over multiple years, and if from our perspective if the -- as I indicated on direct examination, if the dues income was sufficient to cover the nonchargeable expenses, then there wouldn't be a problem.

Q. And it's your understanding that the items that are coded as Code 98 are included in that nonchargeable

[629]

allocation of expenditures; is that correct?

A. That's correct.

* * * * *

Q. If there were sufficient revenues to pay -- for member due to pay for all the nonchargeable expenses, what would this tell you?

A. Well, it would tell us that the agency fees couldn't have been used to pay for any of the nonchargeable activities and, therefore, couldn't have been used to pay for political activities.

Q. When you looked at the statute, which is on Page 2 of that letter --

A. Okay.

Q. -- under the word "expenditures," do you see 42.17.760?

A. Correct.

Q. And does that pretty much characterize your understanding of what the statute says?

24 A. Yes.

25 Q. Did you reach a conclusion as to whether or not the

[630]

1 statute, in your opinion, required that the fees and

2 dues be segregated, that the fees be segregated from

3 the dues?

4 A. Well, we looked at the statute and the statute's

5 silent on that, and concluded that in the absence of

6 it being silent that there wasn't an example I would

7 make, I didn't use this at the meeting when we all

8 met, it's not like an attorney's trust fund under the

9 IOTA, the requirements that go with that. This was --

10 these were not trust funds that had to be put into a

11 separate account.

12 Q. If you were told that in a given year the membership

13 dues amounted to over $16 million, the revenue from

14 membership dues amounted to over $16 million and the

nonchargeable expenditures were $4 million, what would be your conclusion with regard to your analytic procedure?

A. Well, with that hypothetical then the agency fees couldn't have been used for political activities.

Q. Thank you. Have you advised organizations how to set up record keeping in order to comply with statutes?

A. Yes.

Q. And if you were doing so with regard to RCW 42.17.760, would you -- would you advise the organization to set up a segregated account for agency fees?

[631]

A. If you wanted to -- the way I interpret the 760, you could put it into the general account, and because of this bottom of the pool theory, as long as you met that test it wouldn't be used on political activities. If you wanted to remove any question of that, then you would remember the last bullet in the recommendations

I was being asked about, or was it the second to the last, then you would keep it in that separate account and then on a monthly basis make a transfer to more clearly pay for everything that was qualifying expenses.

Q. And, in fact, your recommendations were based on the statement in Phase I review where you were requested to make a recommendations for accounting principles which would accurately track the use of agency fees or political expenditures?

A. That's true. And if you did that it very clearly tracks that, yes.

Q. But and look at language of 42.17.760 on its own.

A. It doesn't seem to be a requirement under 760.

* * * * *

[632]

Q. Let's talk about commingling, Mr. Gocke. Fees were commingled to your knowledge with dues in the general fund for the Washington Education Association?

A. That's true.

Q. And money from that commingled fund was used to make
political expenditures?
A. That's also true.
Q. And on an annual basis, the Association did this Hudson process and we already talked about like the pie chart where your dollar goes and they sent that out to fee payers; that's your understanding?
A. Correct.
Q. And on an annual basis if a fee payer objected or challenged we've learned, and I trust you understand they're issued a refund of the portion of that dollar that would otherwise have gone to those expenses?
A. By those expenses you mean the nonchargeable expenses which is a bigger group than the political, yes.

[633]

Q. Yes. Thank you for clarifying. And so is that statement and that activity in refunding money to fee payers in the sense that if we didn't refund it we would be spending it on these activities consistent with a later claim that it wasn't spent on those

activities for a fee payer who didn't object and who
didn't get a refund.
MS. STRASBERG: Object to the form of the question as argumentative.
THE COURT: I'll allow the answer, overruled.
A. If you wouldn't mind rephrasing it, you lost me at the
end of the first phrase there, phase.
Q. Sorry, I'll try. Is it consistent to say on one hand here's how the dollar is spent --
A. With the pie chart for the Hudson calculation --
Q. Yeah.
A. -- and then to give a portion of that back.
Q. And then come along later and say oh, well, even though we said we were going to spend it if you didn't
object we didn't spend it after all, isn't that two different statements?
A. I don't know if it's two different statements and I don't know if there's a requirement for consistency.
I see your point. You're basically saying my bottom
of the pool theory flies, is inconsistent with the

[634]

Hudson rebate process.
Q. Don't you agree with that?

A. Well, true.
Q. They're not consistent with one another?
A. But I don't know if there's a requirement for that consistency, the --
Q. Let's talk about it another way. We've gone through the two pies for fees and dues. If we made a third pie for the fee payer who get a refund --
A. Oh,
Q. -- wouldn't the fee payer get that 25 percent as a refund?
A. Correct.
Q. And isn't that what the Education Association did?
A. Yes.
Q. And the fee payer who doesn't make an objection that fee payer's money is spent differently from how the objecting fee payer's money is spent?
A. In effect, yes. Although --
Q. Isn't it?
A. I don't know if -- the way you said that, that the nonobjecting fee payer's money is spent differently. That tends to imply that each dollar that's paid in

whether it's from dues or from an agency fee payer is, in effect, buying or paying for a little slice of everything.

Q. In a commingled fund isn't that the way it works?

A. In a commingled fund you have the potential for that occurring, but I don't think that's what occurred with my bottom of the pool theory here.

* * * * *

JAMES SEIBERT

Q. Mr. Seibert, what is the extent of -- what has been the extent of WEA's efforts with respect to the Hudson process over the years since you first began it?

A. Well, it's a very labor-intensive process for our staff, gathering the information to put together in the Hudson packet, to do the mailing usually twice each year, getting it out to several thousand individuals. It has to be reviewed every year to see

if any changes are necessary. We have several staff people that are involved in the process of just the mechanics of getting it together, getting it out, meeting the deadlines, time requirements of it. It's a considerable responsibility for the organization.

Q. And can you give us an estimate as to how many staff and officials of the WEA are involved on an annual basis in this process?

A. Well, at one stage or another in the process, there are probably as many as 15 people that have something to do with this, either in the processing of it, the printing of it, the mailing of it, the review of it, the discussions regarding what the content would be.

* * * * *

LAIRD S. VANETTA

[743]

Q. Would you state and spell both of your names for the record, please.

A. Laird S. Vanetta, L-A-I-R-D V-A-N-E-T-T-A.

Q. And what is your profession or occupation?

A. I'm a Certified Public Accountant.

Q. And can you give us your background in employment history, your educational background and employment history?

A. I have a Bachelor of Accounting from Central Washington University. I graduated in 1980, started working for what was then Tremper Slater & Company, is now Tremper & Company, LLP, and I have been with that firm in excess of 20 years. I'm now a partner with the firm, and I have been a partner with the firm for approximately 10 years.

Q. And what is Tremper & Associates?

A. Tremper & Company, LLP, is a CPA firm that specializes in closely-held corporations, nonprofit organizations, and individual taxes.

* * * * *

[765]

A. The next row is a math calculation again. It's the

amount of the total reported political expenditures
divided by total expenditures for -- for instance in
the year 2000 the total reported political
expenditures were 3.2 percent of the total
expenditures, and then in '99 they were 1.25 percent
of the total expenditures. '98 they were .92 percent.

Q. So less than one percent?

A. Less than one percent of the total expenditures. In
'97 they were 1.82 percent of the total expenditures,
and then again in 1996 they were .52 percent or less
than one percent of the total expenditures. Again,
those are adjusted for the NEA reported amounts.

* * * * *

[767]

Q. All right. Fine. Thank you, Mr. Vanetta. You can
resume the stand if you will.
Based on the work that you have done that is
reflected in Exhibit 156, can you describe for the

Court your opinion with respect to WEA's use of or
nonuse of agency fees for political purposes?
A. It is my opinion that there are sufficient additional
revenues besides either dues or fee revenues to
adequately pay for all of the reported political
expenditures.
Q. Okay. And specifically to what other fund sources do
you refer?

[768]

A. The -- either the interest revenues or the other
revenues.
Q. All right. And --
A. But as it turns out the interest revenues would be
sufficient in and of themselves to have -- be able to
make that determination.
Q. Fine, thank you. Were you present when Mr. Jeff
Baliban testified?
A. Yes, I was.
Q. And do you concur with his opinions?
A. I do not, no.
Q. Why not?
A. I don't concur with his conclusions regarding the

commingling of funds. I am unable to find any accounting that supports that theory of commingling of funds, and the fact that once you commingle funds you have to provide a pro rata or proportional amount of those funds for each expenditure that is made.

Q. And when you spoke of the pro rata or proportionality premise, to your knowledge is there any accounting standard or other industry guide that would support his proportionality conclusions?

A. Not to my knowledge.

Q. And you, in fact, did some research to determine?

A. I have done some fairly extensive word searches

[769]

looking for any type of accounting support for that theory, and I have been unable to find that.

* * * * *

[774]

Q. And do you have any opinions with respect to Mr. Gocke's testimony?

A. I do believe that his opinion is fairly similar to mine. He is taking, if I understand his opinion

correctly --

MR. WENDEL: Your Honor, I'm going to object. I don't think this is relevant in terms of validating or nonvalidating. If there are differences that are the same, that's fine, but it is character evidence in some other guise.

THE COURT: I think I understand your objection. I'll overrule it based upon this is an expert opinion and I will allow him to compare or contrast his opinion with that of other experts.

[775]

A. I believe that his approach is fairly similar to mine. He's taking a larger broad brush approach, if I'm understanding his approach correctly, and saying that the -- as long as there is are sufficient dues revenues to cover the amount of nonchargeable expenditures then agency fees were not spent on political purposes, and the premise being that the political expenditures are a subcategory of nonchargeable expenses. I'm taking essentially the same approach and

saying that besides dues revenues, if you take interest revenues, for instance, or other revenues and use them to compare against the reported political expenditures, then there are funds available to have made all of those expenditures without requiring the use of either dues or agency fees.

And the other part that I didn't notice was that he was unable to find any evidence of the commingling approach.

* * * * *

[778]

THE COURT: Cross-examination.

MR. WENDEL: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WENDEL:

Q. Mr. Vanetta, you said that the WEA had been your client for about 20 years?

A. That's correct.

Q. And --

A. They have actually been our client for longer than

that. I think I said that I worked on them for about

that.

Q. And you expect them to remain your client for the

foreseeable future, I take it?

MS. LONNQUIST: Objection, calls for speculation.

THE COURT: Overruled. You may answer.

A. I would expect that but I don't have a way of really

controlling that. It's up to an annual review by

them.

Q. Your experience as an expert testifying in court is on

behalf of the WEA, correct?

A. Yes.

Q. Now, the illustration you provided in exhibit, gosh, I

lost track of the number, 156, that is not something

that WEA planned to do, correct?

A. For me to prepare that exhibit?

[779]

Q. No. The process of paying for political expenditures

out of these so-called other revenues is not something

that WEA planned to do during the years in question?

A. I cannot say that they didn't plan that.

Q. You're unaware, in fact, of any -- let me be precise.

Prior to the present litigation, you're not aware, are

you, of any conversations, recommendations, policies

within WEA or between WEA and others concerning

methods that may be used to comply with RCW 42.17.760,

are you?

A. Not prior to the current litigation.

Q. And it is, in your opinion, is it that in fact fees

were not used to pay for these political expenses?

Let me state that without the negatives.

A. Please.

Q. Is it your opinion that fees were not used to pay for

the political expenditures?

A. My opinion is that there were sufficient other sources

of revenue to have paid for those fees.

Q. So you are not saying that the fees were not used,

correct?

22 A. I am not saying that the fees were not used.

* * * * *

[783]

4 A. For my -- for purposes of my analysis and conclusion I

5 utilized the amounts that were reported on the PDC

6 reports, I didn't really question.

7 Q. You didn't apply any definition to political

8 expenditures for purposes of your analysis here, you

9 just used what were summarized for you out of the PDC

10 reported expenditures?

11 A. That's correct.

12 Q. Do you have analyzed what particular expenditures were

13 reported to PDC were included in your analysis?

14 A. I didn't get into that detail, no.

15 Q. You said you looked at some but not all of the actual

16 reports made to the PDC, right?

17 A. That was in the prior litigation. That was not as

18 part of this particular.

19 Q. So you didn't look at the reports at all for this

20 particular case, did you?

21 A. Correct.

22 Q. Somebody gave you a summary of those?

A. Yes.
Q. And you have no knowledge as to which items off of those PDC reports were totaled for you, do you?

[784]

A. I do not know.
Q. And you don't know whether all of the political expenditures reported on the PDC reports were included within the numbers given to you, do you?
A. I do not know that. I have not done audit procedures of those amounts.
Q. And outside of the L2 and the L3s, the PDC reports, do you have an opinion as to whether there are other political expenditures as well?
A. I do not.
Q. So you do not have the opinion as reflected on Exhibit 156 that the reported political expenditures are, in fact, all of the political expenditures made by the WEA during the fiscal years in question, do you?
A. That is correct.
Q. And you have no opinion that there are not any other political expenditures, correct?

A. The only opinion I have is that I utilized the report that was given to me as a basis for my conclusions.

Q. The other revenues that you're talking about, part of the other revenues are interest revenues. Have you divided those interest revenues up as to what accounts the interest was derived from?

A. I think I might. The line "other revenues" on my schedule does not have interest revenues in it. The

[785]

line called "interest revenues" would be where those would be.

Q. And that interest revenues is derived from various accounts?

A. That is correct.

Q. Including accounts that hold fees, agency fees, into which agency fees were deposited? Let me put that it way.

A. Yes.

Q. Are you able to account for or deduct for the interest revenues line item on Exhibit 156, those interest revenues that would be attributable to agency fees?

A. I have not tried to do that, no.

Q. And you cannot quantify the interest revenues that may have been derived from accounts or balances that do not include agency fees, correct?

A. That is correct. Although I believe that there -- that you could do that if you really wanted to, I just didn't do that.

Q. You did not do that and you cannot say, then, that there were sufficient interest revenues derived from balances that did not include agency fees to pay for the political expenditures in any of the years you've listed in Exhibit 156; isn't that right?

A. I did not do that analysis, right.

[786]

Q. And the "other revenues" column you've included various items including NEA money that is given to the

WEA, correct?

A. Yes.

Q. And NEA money, as you're aware, is often designated for a particular purpose, correct?

A. Correct.

Q. And if that money is designated for a particular purpose that is not included within the total of political expenditures that you've reported on Exhibit 156, then it would not be appropriate to use that money for those political expenditures, would it?

A. If it was not specifically deemed for those purposes, that would be true.

Q. And so there is likely to be NEA money included in your other revenues that is designated for purposes other than these total reported political expenditures, wouldn't you agree?

A. Yes.

Q. There is also revenue from advertising for the Action Newsletter?

A. Yes. That number is very small.

Q. And that number is not great enough to offset the cost

of producing that newsletter, is it?

A. I don't know the answer to that.

* * * * *

[790]

Q. You do not make an assumption, do you, there is no member dues used to pay for these political expenditures, correct?

A. I did not make that assumption.

Q. Your analysis, in fact, ignores the question of whether or not fees and dues are used in a proportional manner; wouldn't you agree?

A. Yes.

* * * * *

[820]

Q. Let's go away from the matching principle. I just want to know about your whole analysis.
You didn't draw any conclusion as to whether or how fee payer money was spent, correct?

A. Correct.

Q. And you are not saying, are you, that fee payer money wasn't used for political expenses?

A. I was not saying that.

* * * * *

HEARING ON INJUNCTION 11/15/01

* * * * *

[74]

MR. WENDEL: I should note, if I may, at this point that it may not leap out, but in reading this injunction there is specifically no mechanism provided in here for the WEA to go forward and obtain affirmative authorizations. In fact, it's our appreciation that the WEA is not going to do that,

[75]

that they simply intend to go through the refund mechanisms that we're about to discuss. We have no grievance with that. If the WEA were to choose to go forward and seek affirmative authorizations, then I think that the definition in the summary judgment is sufficient.

THE COURT: Okay. That's a point well taken. I don't see any argument about that, so I think you've made the record clear about how this appears. So is there any issue about that, Ms. Strasberg?

MS. STRASBERG: No.

THE COURT: Let's go ahead, then.

MS. STRASBERG: Under 2(a), (b), (c), (d), (e), most of the rest of the -- up until page, the next two pages at least, until we get to (e)(ii), we have agreed upon and we went through some negotiations to come up with a method and a plan for either doing a refund for the next two years or what other system could accommodate an advanced rebate for the following years, and so I don't think that there's any dispute regarding those. I thought I just underlined the case.

THE COURT: I think *Hudson* was underlined in both. I think that's only a method of citing *Hudson*. I don't believe there's a difference there.

[76]

MS. STRASBERG: That's what I thought.

MS. LONNQUIST: Okay.

* * * * *

This page left intentionally blank.

WEA REVENUES AND EXPENDITURES 1996-2000

Fiscal year ended ⟹	2000	1999
Total revenues	$ 20,256,944	$ 19,428,547
Estimated agency fees	$ 947,648	$ 824,704
Percentage of total revenues	**4.68%**	**4.24%**
Total expenditures	$ 19,030,059	$ 19,593,111
Increase (decrease) in net assets	$ 1,226,885	$ (164,564)
Total reported political	$ 609,543	$ 245,135
Percentage of total expenditures	**3.20%**	**1.25%**
Total year end cash balances	$ 8,102,810	$ 7,274,313
Dues revenues	$ 17,115,316	$ 16,421,928
Interest revenues	$ 1,204,268	$ 908,366
Other revenues	$ 1,937,360	$ 2,098,553
Community Outreach revenues (included in dues total)	$ 776,763	$ 428,359

*Excludes $410,000 of NEA funded political expenditures.

Prepared by Laird Vanetta, Certified Public Accountant

1998	1997	1996	Totals
$ 18,669,284	$ 19,017,715*	$ 17,368,877*	$ 94,741,367
$ 847,470	$ 807,044	$ 636,295	$ 4,063,161
4.54%	4.24%	3.66%	4.29%
$ 17,340,877	$ 17,711,107*	$ 17,141,908*	$ 90,817,062
$ 1,328,407	$ 1,306,608	$ 226,969	$ 3,924,305
$ 159,606	$ 321,627	$ 89,792	$ 1,425,703
0.92%	1.82%	0.52%	1.57%
$ 8,055,289	$ 6,620,372	$ 5,006,842	
$ 16,034,783	$ 15,798,784	$ 14,692,181	$ 80,062,992
$ 991,273	$ 838,313	$ 784,869	$ 4,727,089
$ 1,643,228	$ 2,380,618*	$ 1,891,827*	$ 9,951,586
$ 748,705	$ 742,454	$ 622,225	$ 3,318,506

[WEA 002594]

WEA Logo

WEA Letterhead

TO: Certificated and AHE Agency Fee Payers

FROM: James S. Seibert, Executive Director //s//

DATE: September 15, 2000

RE: 2000-01 AGENCY FEE

State statutes, RCW 41.59.100 (certificated) and RCW 28B.52.045 (AHE) allow your Local Education Association, an affiliate of the Washington Education Association (WEA) and the National Education Association (NEA), to negotiate an agency fee provision in a collective bargaining agreement. This law states that the school or college district may deduct (and forward to the education association) from the salary of those who choose not to become Association members an agency fee equal to the amount of dues paid by Association members.

The amount of the WEA membership dues for the 2000-01 school year is $287.00 plus $12.00 dues for political education. Agency fee payers, however, do not pay the $12.00 dues devoted to political education. WEA members may choose to pay, in addition to WEA dues, $12.00 per year for contribution to the WEA Political Action Committee, WEA-PAC. These monies are used for state and local elections, supporting candidates. No agency fees go to WEA-PAC. As an agency fee payer, the WEA-PAC contribution will not be deducted from your paycheck and you will not be asked to contribute to WEA-PAC.

WEA members pay dues to WEA, a Local Association, a UniServ Council, and the National Education Association (NEA). This is because in our experience, the multi-level structure best enables the Association to provide representational services most efficiently without overlapping.

In addition to the WEA agency fee, you will also be required to pay an agency fee to the NEA, and, if they chose to collect one, to your Local Association and UniServ Council. The amount of Local dues can be ascertained by referring to Appendix A, which lists locals in alphabetical order. The amount of UniServ Council dues can be ascertained by referring to appendix B, which lists councils in alphabetical order.

[WEA 002595]

The amount of the NEA dues in the 2000-01 school year is $123.00; no dues go to the NEA-Fund for Children in Public Education (NEA-FCPE). NEA members may choose to pay, in addition to dues, $12.00 per year as a contribution to the political fund, NEA-FCPE. These monies are used to contribute to federal political campaigns for pro-education candidates. No agency fees are directed to NEA-FCPE; as an agency fee payer, the NEA-FCPE contribution will not be deducted from your paycheck and you will not be asked to contribute to NEA-FCPE.

The agency fee pays for many important services of benefit to you; the following is a partial list of such services.

1. The Association represents you in your relationship to your employer.

2. Association staff or leaders bargain a collective bargaining agreement on behalf of all members of your bargaining unit; that collective bargaining agreement controls your wages, hours and other terms and conditions of employment.

3. Should the school district violate the collective bargaining agreement in its treatment of you, the Association can file a grievance on your behalf.

4. If you are called in for a disciplinary interview with your supervisor or other administrator, you may request Association representation during the interview.

5. WEA negotiates with insurance companies, such as Blue Cross/Blue Shield, so that such companies will design insurance packages to meet the unique needs of school employees, and so that such packages will be marketed to school districts at the lowest possible price.

6. WEA sponsors many courses and workshops to train local leaders to protect the rights of members and agency fee payers.

This is not an exhaustive list of services you receive from WEA, your Local Association, your UniServ Council and NEA.

There are certain services available to members which you will not receive as an agency fee payer. One of these is the Educators Employment Liability Insurance Policy. This policy provides up to $1,000,000 insurance if a member is sued on the basis of employment related activities. Under certain circumstances, it also provides up to $35,000 to pay attorney's fees if a member is charged with a crime related to employment. Additionally, WEA members receive a discount on

personal legal services, such as wills, probate, domestic relations, and real estate matters; agency fee payers do not receive this discount. Moreover, pursuant to the terms of the WEA Legal Defense Policy, WEA may provide an attorney to defend its members when their

[WEA 002596]

employer seeks to discharge or non-renew; agency fee payers are not entitled to eligibility for legal services.

If you as an agency fee payer object to the Association spending any part of your agency fee on political or ideological activities not related to collective bargaining or contract administration and enforcement, or on services which agency fee payers do not receive, you will *not* be charged for these activities and services. You will, however, *be* charged for expenditures for activities related to bargaining, contract administration and enforcement, and improving your working conditions. A list of items we view as chargeable and items we deem nonchargeable is set forth in Appendix C.

You have three options: (1) you may pay the full amount equal to dues paid by members; (2) you may object to use of your agency fee for nonchargeable activities but accept the Association's determination of the amount of the fee that is chargeable as is set forth in this letter; or (3) you may choose to object to the use of your agency fee for nonchargeable activities and challenge the Association's calculation of the amounts that are chargeable and nonchargeable, and/or our characterization of items as chargeable or nonchargeable, before an impartial arbitrator. If the third of these options is chosen, the Association bears the burden of proving to the arbitrator that any particular expenditure was chargeable to agency fee payers.

You may object by notifying James Seibert in writing at the following address:

James Seibert, Executive Director
Washington Education Association
33434 Eighth Avenue South
Federal Way, Washington 98003

The objection must contain the following information:

1. Your name, home address, school and home telephone numbers.
2. The type of position in which you are employed (i.e., community college faculty, K-12 teacher, etc.).
3. Whether you are employed part time, full time, or as a substitute.
4. The name of the school district by which you are employed and the name of the WEA affiliate which is the collective bargaining representative for the bargaining unit in question.

[WEA 002597]

5. If you wish to challenge the Association's calculation of the amounts that are chargeable and nonchargeable, or our characterization of items as chargeable or nonchargeable, your objection letter must state that you wish to "*challenge*".

If such written objection has not been postmarked by October 16, 2000, you will waive your ability to object.

Only a single general statement of objection and/or challenge is necessary to object to and/or challenge the WEA agency fee, the NEA agency fee, the Local agency fee and the UniServ Council agency fee.

In considering whether you wish to object to the amount of the fee, please examine the following documents:

1. *Appendix D.* The description of the WEA expenditure budget for the 1998-99 fiscal year.
2. *Appendix E.* WEA chargeable and nonchargeable expenditures by budget area or 1998-99.
3. *Appendix F.* The audited statement of WEA expenses in the 1998-99 fiscal year, which includes the auditor's review of the chargeable/nonchargeable calculations.
4. *Appendix G.* How WEA calculates its agency fee.
5. *Appendix H* (if applicable). If your UniServ Council is seeking to collect an agency fee: 1) A declaration from an officer or staff member of the Council, explaining the operation of the Council and its financial records, and incorporating the Council's 1998-99 year-end financial statements, including its breakdown of expenditures into chargeable and nonchargeable categories, and; 2) an independent audit of the Council's 1998-99 expenditures.
6. *Appendix I* (if applicable). If your Local Association is seeking to collect an agency fee, enclosed are: (1) a declaration from an officer of your Local Association, incorporating and explaining its 1998-99 financial and time keeping records, including its breakdown of expenditures into chargeable and nonchargeable categories, and; 2) If your Local has more than 850 members, an independent audit of LEA's 1998/99 expenditures. Local Associations with more than 850 members include:

[WEA 002598]

Bellevue EA
Edmonds EA
Everett EA
Evergreen EA
Federal Way EA
Highline EA
Kent EA
Lake Washington EA
Northshore EA
Puyallup EA
Seattle EA
Spokane EA
Tacoma EA
Vancouver EA

7. *Appendix J.* NEA cover memorandum.

8. *Appendix J-1.* NEA chargeable and nonchargeable audited expenditures for the 1998-99 fiscal year.

9. *Appendix J-2.* The audited NEA financial statement as of August 31, 1999 and 1998. This is an independent auditor's statement of expenditures made by the NEA.

If your local association is seeking to collect an agency fee, the percentage of local dues that an objector will pay differs depending on whether the association has more or less than 850 members. If your local association has *more* than 850 members, an objector will pay the actual percentage of local dues identified as "chargeable" in the enclosed local association declaration. If it has *less* than 850 members, an objector will pay WEA's chargeable percentage of local association dues as an agency fee, or the actual percent of local dues identified as chargeable in

the enclosed declaration, whichever is less, unless that local association had an audit done of its 1998-99 expenditures. If an audit was performed (in which case the audit report is enclosed), an objector will pay the actual percentage of local dues identified as "chargeable" in the enclosed local association declaration.

The agency fee charged by the UniServ Council is the percentage of dues identified as chargeable in the enclosed council declaration.

For 2000-01, the agency fee charged by WEA is 75.7% of dues.

For 2000-01, the agency fee charged by NEA is 60% of dues.

[WEA 002599]

In March of 1994, WEA presented evidence to an arbitrator to justify the application of WEA's chargeable percent to its councils and locals. At the arbitration, WEA presented evidence of the expenses of a number of local associations. The arbitrator ruled that WEA could use WEA's chargeable percent to calculate the chargeable fee of those locals because:

> *The evidence at the hearing made it clear that the Locals . . ., because of their basic mission, must spend at least as much time, if not more, on representational issues. The staff and elected officers of these organizations must spend their time meeting with employer representatives to discuss issues of employee concern. They also spend a great deal of time meeting with individual employees with accusation, complaint, or grievance. And, as stated, they spend virtually no time in the most significant non-chargeable areas, being*

political action and public relations. I agree with the Associations (keeping in mind the Hudson admonishment that "absolute precision" is not required) that the local presumption option, which has been endorsed by some courts, is a valid alternative.

Accordingly, that arbitrator ruled that each of the locals could use WEA's chargeable percent. Four other arbitrators have also permitted the Association to use WEA's chargeable percent to estimate the locals' agency fee in this notice. In addition, use of WEA's chargeable percentage to estimate the agency fees for objectors in locals with fewer than 850 members was approved in 1998 by the U.S. District Court (W.D. Wash) as part of a settlement of a class action lawsuit.

Please examine the enclosed material and reflect for a moment on the services that the Association provides agency fee payers. I am confident that if you do so, you will agree that the Association delivers services worth the full amount of Association dues.

Enclosures

g:af/00-01/Hudson notice/certahe1Hudson cover letter.doc

[WEA 002624]

Appendix C

Category Code Descriptions	
Chargeable Activities (If uncertain, err toward categorizing as nonchargeable.)	**Allocated Activities**
Code Description	**Code Description**
10. Activities related to collective bargaining, contract administration and enforcement, including grievance processing and arbitration, working conditions, employee rights and job security, and research related to any chargeable activity.	61. Leaves, holidays, office closures. 62. Staff meetings. 63. General office work, trainings or meetings that cannot readily be separated into chargeable and nonchargeable components.
11. Preparation for strikes and activities undertaken in connection with lawful strikes.	**Nonchargeable Activities**
23. Revitalizing locals and members; maintenance of membership; organizational development. Does not include activeities that serve only the purpose of recruiting new members, persuading existing members to	**Code Description** 96. Donations. 98. Other nonchargeable activities: • Support of nonchargeable activities. • Lobbying, including

Category Code Descriptions	
Chargeable Activities	**Nonchargeable Activities**
retain their association membership, or organizing nonmember employees. 24. Instructional and professional development. 25. Association conventions and governance meetings. 26. Training and meetings related to chargeable activities. If a portion of an otherwise chargeable training or meeting is devoted to nonchargeable matters, separate out the nonchargeable time and put it in Code 98, or if separation is not feasible, put the entire training or meeting in Code 63. 32. Communicating information to members or fee payers related to any chargeable activity.	lobbying state agencies. • Meetings and trainings (or portions thereof) not related to chargeable activities. • External public relations. • Internal communications regarding nonchargeable activities. • Litigation or research not related to Association's duty as exclusive bargaining agent or organizational maintenance. • Political or ideological activities supporting or opposing a particular candidate or party or initiative; activities to influence an election; activities related to levies, taxes, school funding, state or federal policy. • Organizing and recruiting non-members, and administrative or legal proceedings re-

Category Code Descriptions	
Chargeable Activities	**Nonchargeable Activities**
33. Activities supporting chargeable activities or needed to maintain Association as an entity. 34. Scholarships and awards (if available to fee payers or their children). 35. General office work related to chargeable activities. See instructions for Code 26.	lated to same; unit clarifications or representation elections; defending against efforts by other unions to represent units now represented by the Association. • Insurance protection and other member benefits not available to agency fee payers. • Student WEA, WEA-R. • Operation of political committee. • Voter registration. • Activities related to unlawful strikes. Put preparation for strikes, whether lawful or unlawful, in category 11. • General office work not related to chargeable activities.

APPENDIX F

Member of
American Institute of
Certified Public
Accountants

TREMPER & CO., LLP
Certified Public Accountants

100 W. Harrison Street, Suite 300
Seattle, Washington 98119-1165
(206) 285-4456
Fax (206) 285-5456

Member of
Washington Society of
Certified Public
Accountants

INDEPENDENT AUDITOR'S REPORT ON ADDITIONAL INFORMATION

To Mr. James Seibert, Executive Director
And the Executive Committee of the
Board of Directors
Washington Education Association
Federal Way, Washington

Our report on our audit of the basic financial statements of the Washington Education Association as of August 31, 1999 and for the year then ended, appears on page one. That audit was conducted for the purpose of forming an opinion on the basic financial statements taken as whole. The accompanying summary schedule of agency fee chargeable and nonchargeable expenditures for the year ended August 31, 1999 is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such information has been subjected to the auditing procedures applied in the audit of the basic financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.

//s// [Tremper & Co., LLP.]

Certified Public Accountants

August 1, 2000

WASHINGTON EDUCATION ASSOCIATION

SUMMARY SCHEDULE OF AGENCY FEE CHARGEABLE AND NONCHARGEABLE EXPENDITURES — *FOR THE YEAR ENDED AUGUST 31, 1999*

	Chargeable Expenditures	Nonchargeable Expenditures	Total Expenditures
Program Area:			
Governance and Administration	$ 2,137,321	$ 613,763	$ 2,751,084
Public policy center	---	1,305,407	1,305,407
Advocacy center	5,113,706	577,804	5,691,510
Information center	1,368,320	684,626	2,052,946
Learning and education center	1,092,160	22,651	1,114,811
Support services center	3,882,827	936,268	4,819,095
TOTAL CHARGEABLE AND NONCHARGEABLE EXPENDITURES	$13,594,334	$ 4,140,519	$17,734,853
EXPENDITURE PERCENTAGES	76.7%	23.3%	
Community Outreach			497,043
NEA and Grant Reductions			1,370,941
TOTAL BUDGETARY EXPENDITURES			$ 19,602,837

FILED
DEC -3 2001
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

The Honorable Gary R. Tabor

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

State Of Washington ex rel. Public Disclosure Commission, Plaintiff, v. Washington Education Association, Defendant.	No. 00-2-01837-9 PERMANENT INJUNCTION

The above cause having come on regularly for trial on the 14th day of May, 2001, before the court sitting without a jury, plaintiff having been represented by Christine O. Gregoire, Attorney General, D. Thomas Wendel, Assistant Attorney General, and Richard Heath, Special Assistant Attorney General, and defendant having been represented by Judith Lonnquist, Harriet Strasberg, Michael J. Gawley, and Aimee Iverson, and evidence both oral and documentary having been introduced, the case argued, and the Court having entered a letter Opinion on July 30, 2001 concluding that defendant violated RCW 42.17.760 and that an injunction should be entered, and the Court having considered further arguments and pleadings of the parties, now, therefore,

IT IS HEREBY ORDERED that defendant Washington Education Association shall implement the following measures to comply with RCW 42.17.760 immediately and within 30 days of the date of this Order complete the following activities, unless a different date or time period is otherwise specified for a specific activity in the terms of this Order below:

1. For each fiscal year from the present, WEA shall identify, record, and quantify all expenditures and contributions to influence an election or operate a political committee (§ 760 expenses), which shall include all political advertising expenditures, as well as direct and in-kind contributions, internal political communications, and independent expenditures. § 760 expenses do not include expenditures made by WEA from its Community Outreach Program, which does not utilize agency shop fees. Activities to accomplish this shall include the following:

a) Revise Weekly Activity Reports (WAR Reports) to include the Category Description items enumerated 91 and 93, as shown on Exhibit 1 hereto, in the activities reported on WAR Reports, and instruct and require employees who keep WAR reports to report time on activities encompassed in Categories 91 and 93 and provide supervisory review of WAR reports within a reasonable time following their completion;

b) For those employees who do not keep WAR Reports and who engage in activities that meet the description of § 760 expenses, WEA shall instruct and require those employees to keep Political Activity Reports (PAR Reports) and to report time on such activities in their PAR Reports, whether or not those activities are reportable to the PDC.

c) Record for each advertising expense for political purposes or to influence an election, a general description of the content, the identity of the candidate or ballot proposition to which the advertising relates, if any, and take such other measures as are necessary to identify and quantify political advertising expenses;

d) Record expenses and salaries associated with internal communications to enable identification and quantification of all expenses of any internal communications to support or opposes ballot propositions or candidates or otherwise are made to operate a political committee or influence an election;

e) Record all direct and in-kind contributions to political committees or to influence elections;

f) For each WEA fiscal year, generate a written analysis of WEA's § 760 expenses, which produces both the total dollars that were used for these purposes and the percentage of WEA's total expenditures that were used for these purposes;

g) Obtain a certification of an independent audit that satisfies generally accepted accounting and auditing standards of each fiscal year's analysis of all of WEA's § 760 expenses;

2. WEA shall return to all agency fee payers who have not affirmatively authorized (as defined by the Court's ruling on Plaintiff's Motion for Summary Judgment) the use of their fees for expenditures or contributions to influence an election or operate a political committee a percentage of the annual fees charged to the fee payer, in the following manner:

a) For WEA fiscal years 2001 – 2002, and 2002 – 2003, issue a refund or rebate in an amount equal to eight percent (8 %) of the agency fee charged annually by WEA to the fee payer for each fiscal year, and until the refunds or rebates are made, maintain in a segregated account an amount equivalent to eight percent (8 %) of all agency fees received by the WEA; however, no refunds or rebates need be given to fee payers who are objectors or challengers under WEA's *Hudson* process and receive a refund of the non-chargeable portion of their fees inclusive of the portion related to WEA's political expenditures;

b) For WEA fiscal year 2001 – 2002, the refund or rebate to agency fee payers shall be mailed on or before January 15, 2002. Another mailing of rebates will be mailed on or before April 15, 2002 to capture any fee payers employed during the 2001 – 2002 fiscal year, but who were unknown to WEA before December 31, 2002;

c) For WEA fiscal year 2002 – 2003, the refund or rebate to agency fee payers shall be mailed to all known agency fee payers by November 15, 2002. Another mailing of rebates will be mailed on or before April 15, 2003 to capture any fee payers employed during the 2002 – 2003 fiscal year but who were unknown to WEA on November 15, 2002.

d) For fiscal years 2001 – 2002 and 2002 – 2003, any refunds or rebates that cannot be conveyed to agency fee payers because the rebates or refunds are returned to WEA undelivered, or which WEA

cannot mail, or for any other reason, shall be retained until the end of the subject fiscal year by WEA in a segregated account, and if they remain unclaimed and undeliverable by August 31 of that fiscal year, the unclaimed or undeliverable funds so retained shall be distributed to the WEA Children's Fund, to the American Red Cross, or to Northwest Harvest.

e) For WEA fiscal year 2003 – 2004, and every fiscal year thereafter, WEA shall reduce the agency fees chargeable to agency fee payers from an amount equivalent to 100 percent of the member dues by

(i) the percentage of the WEA's total expenditures that are analyzed to have been used for § 760 expenses in the second fiscal year prior, e.g. reductions in 2003 – 2004 shall be based upon WEA's analysis of 2001 – 2002 expenditures,

(ii) plus a cushion of 3 percent of the annual agency fee for the respective fiscal year, in order to take into account the annual variations that may occur in WEA's § 760 expenses, the short term agency fee payer who may not be employed long enough to benefit from averaging of long term variations, and negligible errors in either calculations or organization expenses.

f) Separate refunds or rebates will not be issued to fee payers who object or challenge and receive a rebate equal to the non-chargeable percentage of WEA expenditures, pursuant to federal case law and the *Leer* settlement agreement, as the § 760 expenses are already included in the overall non-chargeable percentage of agency fees rebated to fee payers who object or challenge.

3. WEA may release and deposit into its general fund 70 per cent of agency fees paid to and for WEA during fiscal year 2000 – 2001 and which have been held in escrow; the remaining 30 per cent shall be retained in escrow until a final resolution is reached in the matter of *Davenport v. WEA*, Thurston County Superior Court Cause No. 01-2-00519-4. If damages must be paid to plaintiffs by WEA in *Davenport*, then the escrowed amount may be used for those damages. If defendant is not liable to plaintiffs in *Davenport* for agency fees collected in WEA fiscal year 2000 – 2001, then this matter may be brought on by the parties for further consideration by this Court before the remaining escrowed funds are released by WEA.

IT IS HERBY FURTHER ORDERED that:

A. This Injunction shall take effect immediately and remain in effect permanently, except that, in the event the Washington State Public Disclosure Commission promulgates and puts into effect administrative rules that impose measures in conflict with this Injunction, or any valid initiative or legislation is passed, then any provision of this Injunction that is in conflict with the administrative rules and/or statutes shall be void, but the provisions of this Injunction not in conflict shall remain in full force and effect.

B. Nothing herein shall be construed to waive or foreclose any challenge that might otherwise be made to rulings and findings made by this Court at any stage in these proceedings, and any provisions of this Injunction dependent upon such rulings and findings.

C. Compliance with this injunction and any statutes or PDC rules that may be promulgated that affect this injunction pursuant to Paragraph A, above, shall constitute compliance with RCW 42.17.760.

D. This Court shall retain jurisdiction of this matter for enforcement of this Injunction, and, in the event an action is brought to assert a violation of this Injunction, the prevailing party shall be entitled to reasonable attorney fees and costs for the challenge.

DONE IN OPEN COURT this *3rd* day of *Dec*, 2001.

//s//

JUDGE GARY R. TABOR

Presented, without waiver of objections, by:

CHRISTINE O GREGOIRE
Attorney General

//s//
D. THOMAS WENDEL, WSBA #15445
Assistant Attorney General
Attorneys for Plaintiff

APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED:

//s//
Harriet Strasberg, WSBA #15890
Attorneys for Defendant

Exhibit 1

Category Code Descriptions

Chargeable Activities

(If uncertain, err toward categorizing as nonchargeable.)

Code	Description
10.	Activities related to collective bargaining, contract administration and enforcement, including grievance processing and arbitration, working conditions, employee rights and job security, and research related to any chargeable activity.
11.	Preparation for strikes and activities undertaken in connection with lawful strikes.
23.	Revitalizing locals and members; maintenance of membership; organizational development. Does not include activeities that serve only the purpose of recruiting new members, persuading existing members to retain their association

Allocated Activities

Code	Description
61.	Leaves, holidays, office closures.
62.	Staff meetings.
63.	General office work, trainings or meetings that cannot readily be separated into chargeable and nonchargeable components.

Nonchargeable Activities

Code	Description
90.	Lobbying, including lobbying state agencies and grass roots lobbying.
91.	Internal member communications supporting or opposing election campaigns or to influence an election.

Category Code Descriptions	
Chargeable Activities	**Nonchargeable Activities**
membership, or organizing nonmember employees. 24. Instructional and professional development. 25. Association conventions and governance meetings. 26. Training and meetings related to chargeable activities. If a portion of an otherwise chargeable training or meeting is devoted to nonchargeable matters, separate out the nonchargeable time and put it in Code 96, or if separation is not feasible, put the entire training or meeting in Code 63. 32. Communicating information to members or fee payers related to any chargeable activity.	92. Internal member communications regarding other nonchargeable activities. 93. External political activeties supporting or opposing a particular candidate or party or initiative; external activities related to levies, or bond elections; activities related to the operation of a political committee. 94. Voter registration. 95. General office work not related to chargeable activities and other support of non-chargeable activities. 96. Additional nonchargeable activities: • Donations • Ideological or other activities related to

Category Code Descriptions	
Chargeable Activities	**Nonchargeable Activities**
33. Activities supporting chargeable activities or needed to maintain Association as an entity. 34. Scholarships and awards (if available to fee payers or their children). 35. General office work related to chargeable activities. See instructions for Code 26.	state or federal policy. • Meetings and trainings (or portions thereof) not related to chargeable activities; • External public relations; • Litigation or research not related to Association's duty as exclusive bargaining agent or organizational maintenance. • Organizing and recruiting non-members, and administrative or legal proceedings related to same; unit clarifications or representation elections; defending against efforts by other unions to represent units now represented by the Association. • Activities related to unlawful strikes. Put preparation for strikes, whether lawful or unlawful, in category 11. • Insurance protection and other member benefits not available to agency fee payers. • Student WEA, WEA-R.

6295

(B)

Supreme Court, U.S.
FILED
NOV 9 - 2006
OFFICE OF THE CLERK

No. 05-1589

IN THE

Supreme Court of the United States

GARY DAVENPORT, MARTHA LOFGREN, SUSANNAH SIMPSON, AND TRACY WOLCOTT,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

---

BRIEF FOR PETITIONERS

MILTON L. CHAPPELL
Counsel of Record
GLENN M. TAUBMAN
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 321-8510

STEVEN T. O'BAN
Ellis, Li, & McKinstry PLLC
Two Union Square
601 Union St., Suite 4900
Seattle, WA 98101-3906
(206) 682-0565

November 9, 2006

Counsel for Petitioners

QUESTIONS PRESENTED

I. Do labor union officials have a First Amendment right to take the wages of employees who have chosen not to become union members and use them for political purposes?

II. Does a state campaign finance law that prohibits labor unions and their officials from taking the wages of nonmembers and using them for partisan political campaigns without the nonmembers' affirmative consent violate the First Amendment rights of labor unions?

LIST OF ALL PARTIES

The caption contains the names of all parties in this Court. In addition to the four Petitioners named in the caption, the late Walt Pierson was a party to the proceedings below.

No corporate disclosure statement for any Petitioner is required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Introduction 2
II. The Facts 3
III The Proceedings Below 8

SUMMARY OF ARGUMENT 13

Question I 13
Question II 15

ARGUMENT 17

I. Labor Unions Do Not Have a Constitutional Right to Use the Wages of Nonmembers for Any Activity, Much Less to Fund the Political Agenda of the Union 17

TABLE OF CONTENTS-CONT.

Page

II. Because There Is No First Amendment Right of Unions and Their Members to Collect or Use Nonmembers' Fees for Politics, Section 760 Need Only Satisfy the Rational Basis Test, Which It Does 23

III. This Court's "Dissent Is Not to Be Presumed" Phrase Applies Only to Voluntary Union Members 31

IV. Even if the "Dissent Is Not to Be Presumed" Phrase Applies to Nonmembers, the States Can Provide Statutory Protections to Nonmembers That Exceed the Constitutional Minimum Without Violating the Union's First Amendment Rights 38

V. Section 760's Limits on Using Silent Nonmembers' Wages for Politics Are Less Restrictive of Any Possible Union First Amendment Rights Than the Limits Placed on Unions by the Federal Campaign Finance Act That This Court Upheld Against Similar Constitutional Attack 41

CONCLUSION 46

TABLE OF AUTHORITIES

Cases ***Page***

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) ..... *passim*

Airline Pilots Ass'n v. Miller,
523 U.S. 866 (1998) 15, 34, 35, 36

American Federation of Labor v. American Sash & Door Co.,
335 U.S. 538 (1949) 20

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) ..... *passim*

Babbitt v. United Farm Workers National Union,
442 U.S. 289 (1979) 17

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 11, 12, 22

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 30

Brown v. Alexander,
718 F.2d 1417 (6th Cir. 1983) 20

Buckley v. Valeo,
424 U.S. 1 (1976) 24

California v. Ramos,
463 U.S. 992 (1983) 39

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) ..... *passim*

City of Charlotte v. Local 660, International Ass'n of Firefighters,
426 U.S. 283 (1976) 20

TABLE OF AUTHORITIES-CONT.

Page

Civil Service Commission v. Letter Carriers,
413 U.S. 548 (1973) 30

Ellis v. Railway Clerks,
466 U.S. 435 (1984) 4, 33, 34

Elrod v. Burns,
427 U.S. 347 (1976) 30

FEC v. Beaumont,
539 U.S. 146 (2003) 42, 43

FEC v. Massachusetts Citizens for Life,
479 U.S. 238 (1986) 28, 43

FEC v. National Education Association,
457 F. Supp. 1102 (D.D.C. 1978) ..... *passim*

FEC v. National Right to Work Committee,
459 U.S. 197 (1982) 42, 43

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 42

Harris v. McRae,
448 U.S. 297 (1980) 25

Hudson v. Chicago Teachers Union,
743 F.2d 1187 (7th Cir. 1984) 34

Keller v. State Bar of California,
496 U.S. 1 (1990) 39

Kelo v. City of New London,
545 U.S. 469 (2005) 39

Kidwell v. Transportation Communications International Union,
946 F.2d 283 (4th Cir. 1991) 32

TABLE OF AUTHORITIES-CONT.

Page

Lehnert v. Ferris Faculty Ass'n,
500 U.S. 507 (1991) 21, 34

Lincoln Federal Labor Union v. Northwest Iron & Metal Co.,
335 U.S. 525 (1949) 20, 22, 39

Locke v. Davey,
540 U.S. 712 (2004) 25, 39

Lyng v. UAW,
485 U.S. 360 (1988) 24

Lutz v. Machinists,
121 F. Supp. 2d 498 (E.D. Va. 2000) 37

Machinists v. Street,
367 U.S. 740 (1961) ..... *passim*

Machinists v. Street,
108 S.E.2d 796 (Ga. 1959) 32

McConnell v. FEC,
540 U.S. 93 (2003) 16, 42, 43

Michigan State AFL-CIO v. Miller,
103 F.3d 1240 (6th Cir. 1997) ..... *passim*

Minnesota State Board for Community Colleges v. Knight,
465 U.S. 271 (1984) 31

Mitchell v. Los Angeles Unified School District,
963 F.2d 258 (9th Cir. 1992) 34

NLRB v. Financial Institution Employees,
475 U.S. 192 (1982) 32

Oregon v. Hass,
420 U.S. 714 (1975) 39

TABLE OF AUTHORITIES-CONT.

Page

Pipefitters v. United States,
407 U.S. 385 (1972) 29, 43, 45

PruneYard Shopping Center v. Robins,
447 U.S. 74 (1980) 39

R.A.V. v. City of St. Paul,
505 U.S. 377 (1991) 37

Railway Clerks v. Allen,
373 U.S. 113 (1963) 9, 34

Railway Employes' Department v. Hanson,
351 U.S. 225 (1956) 20

Regan v. Taxation with Representation,
461 U.S. 540 (1983) 26

Rust v. Sullivan,
500 U.S. 173 (1991) 25

Skinner v. Oklahoma,
316 U.S. 535 (1942) 39

Smith v. Arkansas State Highway Employees,
441 U.S. 463 (1979) 19, 20, 24

South Carolina Education Ass'n v. Campbell,
883 F.2d 1251 (4th Cir. 1989) 20

South Dakota v. Dole,
483 U.S. 203 (1987) 25

Standard Fittings Co. v. NLRB,
845 F.2d 1311 (5th Cir. 1988) 32

United Public Workers v. Mitchell,
330 U.S. 75 (1949) 30

TABLE OF AUTHORITIES-CONT.

Page

United States v. American Library Ass'n,
539 U.S. 194 (2003) 26

United States v. Boyle,
482 F.2d 755 (D.C. Cir. 1973) 44

United States v. CIO,
335 U.S. 106 (1948) 43

Weaver v. University of Cincinnati,
970 F.2d 1523 (6th Cir. 1992) 34

Webster v. Reproductive Health Services,
492 U.S. 490 (1989) 25

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) 39

Constitutions

United States Constitution,
amend. I ..... *passim*
amend. XIV 1

Colo. Const. art. 28,
§ 3(4) 44
§ 6(2) 44

Okla. Const. art. 23,
§ 1A 19

TABLE OF AUTHORITIES-CONT.

Page

Statutory, Regulatory and Rule Provisions

Federal Election Campaign Act of 1971, 2 U.S.C.
§ 431b 42
§ 441b(a) 41, 44
§ 441b(b)(3) 44
§ 441b(b)(3)(A) 44
§ 441b(b)(4)(A)(ii) 41, 44

Hatch Act, 5 U.S.C.
§ 7324 30

Pension Protection Act 2006, 26 U.S.C.
§ 401(13) (West 2006) 30

28 U.S.C. § 1257(a) 1

National Labor Relations Act, 29 U.S.C.
§ 159(e). 19
§ 164(b) 19

Railway Labor Act, 45 U.S.C.
§ 151 *et seq.* 33

Alaska Stat.
§ 15.13.074(f) (2006) 44
§ 15.13.135 (2006) 44

Ariz. Rev. Stat. Ann.
§ 16-919(B) (West 2006) 44
§ 16-920 (West 2006) 44
§ 16-921 (West 2006) 44

Cal. Gov't Code
§ 3515.7(d) (West Supp. 2006) 18

Cal. Pub. Util. Code
§ 99566.1(d)(1) (West Supp. 2006) 18

TABLE OF AUTHORITIES-CONT.

Page

5 Ill. Comp. Stat. Ann.
315/3(g) (West 2005) 18

115 Ill. Comp. Stat. Ann.
5/11 (West 1998) 18

Ill. Rev. Stat., ch. 122, ¶ 10-22.40a
(1983, repealed 1984) 34

Ind. Code Ann.
§ 3-9-2-4 (West 2006) 44
§ 3-9-2-5(b) (West 2006) 44
§ 20-7.5-1-6 (West 2006) 23

Iowa Code Ann.
§ 20.26 (West 2006) 44

Md. Code Ann., Elec. Law
§ 13-242 (2006) 44
§ 13-243 (2006) 44

Md. Code Ann., Educ.
§ 6-504(b) (2006) 18
§ 6-504(d)(1)(2006) 18
§ 6-504(d)(3)(iv)(1) (2006) 18
§ 6-504(d)(3)(iv)(2) (2006) 18

Mich. Comp. Laws Ann.
§ 169.254 (West 2006) 44
§ 169.255 (West 2006) 44

Minn. Stat. Ann.
§ 179A.06(3) (West Supp. 2006) 18

Mont. Code Ann.
§ 39-31-402(3) (2005) 18
§ 39-32-109(2)(d) (2005) 18

TABLE OF AUTHORITIES-CONT.

Page

Neb. Rev. Stat. Ann.
§ 49-1469 (2006) 44
§ 49-1469.06 (2006) 44

N.J. Stat. Ann.
§ 34:13A-5.5(b) (West Supp. 2005) 18

N.M. Stat. Ann.
§ 10-7E-4(J) (West Supp. 2003) 18

N.C. Gen. Stat. Ann.
§ 163-278.19(a) (2006) 44
§ 163-278.19(b) (2006) 44

N.D. Cent. Code
§ 16.1-08.1-01(1) (2006) 44
§ 16.1-08.1-03.3 (2006) 44

Ohio Rev. Code Ann.
§ 3517.082 (West 2006) 44
§ 3599.03 (West 2006) 44
§ 3599.031(A) (West 2006) 44

Pa. Cons. Stat. Ann.
§ 1101.1701 (West 2006) 44
§ 1102.2 (West 2006) 18
§ 1102.4 (West 2006) 18

S.D. Codified Laws Ann.
§ 12-25-1(1) (2006) 44
§ 12-25-2 (2006) 44

Tex. Elec. Code Ann.
§ 253.094 (Vernon 2006) 44
§ 253.100 (Vernon 2006) 44

TABLE OF AUTHORITIES-CONT.

Page

Utah Code Ann.
§ 20A-11-1403 (2006) 44
§ 20A-11-1404 (2006) 44

Vt. Stat. Ann. tit. 3,
§ 902(19) (2003) 18
§ 1011(4) (2003) 18

Wash. Rev. Code Ann.
§ 41.56.122(1) (West 2006) 3, 34
§ 41.59.100 (West 2006) 3, 34
§ 42.17.760 (West 2006) ..... *passim*

Wis. Stat. Ann.
§ 11.29 (West 2006) 44
§ 111.02(10m) (West 2006) 18
§ 111.70(1)(n) (West 2006) 18
§ 111.81(16) (West 2006) 18
§ 111.70(2) (West 2006) 18
§ 111.85(2)(a) (West 2006) 18

Wyo. Stat. Ann.
§ 22-25-102 (2006) 44
§ 22-25-102(h) (2006) 44

Federal Election Commission Regulations, 11 C.F.R.
§ 114.5(a) 44
§ 114.5(a)(1) 44
§ 114.5(g)(2) 44

TABLE OF AUTHORITIES-CONT.

Page

Other Authorities

Charles W. Baird, *The Tip of the Iceberg: PACs & the Forced-Dues Base of Big Labor's Political Machine*, The Smith Center for Private Enterprise Studies (2001) 24

I. Brant, *James Madison: The Nationalist* (1948) 21

Department of Labor, "Proposed Regulation Relating to Default Investment Alternatives Under Participant Directed Individual Account Plans," Federal Register: Sept. 27, 2006 (Vol. 71, No. 187), 29 C.F.R. Part 2550 30

Federal Election Commission, "Campaign Guide for Corporations and Labor Unions," 11 C.R.F. Part 102 41

The Influence of Automatic Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement, Employment Benefit Research Institute, Issue Brief #283, July 2005 29

Craig Lambert, *The Marketplace of Perceptions*, Harvard Magazine, March-April 2006 ..... 29, 30

OPINIONS BELOW

The opinion of the Washington Supreme Court is officially reported at 156 Wash. 2d 543 (2006), unofficially reported at 130 P.3d 352 (Wash. 2006), and reprinted in the Appendix to the *Davenport* Petition for Certiorari, No. 05-1589 ("Pet. App.") at page 1a. The unpublished opinion of the Washington Court of Appeals in *Davenport*, Pet. App. at 42a, is available at 117 Wash. App. 1035 (2003). The decision of the trial court in *Davenport*, Pet. App. at 45a, is not reported. The Court of Appeals' opinion in the consolidated case, *Washington v. Washington Education Ass'n*, No. 05-1657, is reported at 117 Wash. App. 625, 71 P.3d 244 (2003), Pet. App. at 50a. The decision of the trial court in *Washington*, Pet. App. at 77a, is not reported.

JURISDICTION

The Washington Supreme Court entered judgment on March 16, 2006. The Petition for a Writ of Certiorari was timely filed on June 13, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **First Amendment of the United States Constitution** provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The **Fourteenth Amendment** provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The **Washington Fair Campaign Practices Act, § 760,** provides: "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." Wash. Rev. Code § 42.17.760 (2006).

STATEMENT OF THE CASE

I. Introduction

Section 760 of the Washington Fair Campaign Practices Act ("§ 760") protects the free speech and association rights of an employee who has chosen not to join a union. Although this Court has repeatedly determined that such an employee has a First Amendment right not to subsidize the union's politics, the Washington Supreme Court struck down the statute as unconstitutional, concluding that it impaired the "union's right of expressive association" for its members. Pet. App. at 29a.

Section 760 does not limit a union's use of ***voluntary members' dues*** for any purpose. It applies only to a union's use of ***nonmembers' compelled fees*** "to make contributions or expenditures to influence an election or to operate a political committee" ("politics" or "political"). Section 760. No authorization to use members' dues for political purposes is required. Thus, the First Amendment rights of a union and its members are not implicated by § 760.

The statute requires a union to obtain consent only from those employees who have not joined it. The only issue here is the procedures under which a union may use nonmembers' compelled fees for politics. *See* Permanent Injunction, Joint Appendix ("Jt. App.") at 208-15, which details the measures

the Washington Education Association ("WEA" or "the union") must take to comply with § 760.

There is no more of a constitutionally protected right for a union to use nonmembers' monies for its political purposes than there is for any other organization to use the funds of individuals who have not joined the organization. Nevertheless, the Washington Supreme Court majority struck down § 760's modest procedural requirement for a union's political use of nonmembers' compelled fees because it violated the court majority's novel and absurd proposition that, once a legislature creates a compelled-fee requirement, unions have a constitutional right to use nonmembers' fees for politics. *Compare* Pet. App. at 22a-23a (majority) *with* 32a-33a, 39a-41a (dissent).

II. The Facts

Petitioners are four current or former public school teachers who have chosen not to become members ("nonmembers" or "nonunion teachers") of their exclusive bargaining representatives, local affiliates of respondent WEA. The nonmembers are compelled by statute, Wash. Rev. Code §§ 41.59.100 & 41.56.122(1) (2006), to pay "fees" to the union that equal full membership dues ("agency shop").[1] Jt. App. at 34, 194. Part of members' dues and nonmembers' compelled fees is used to support political and ideological causes that are unrelated to the union's collective bargaining activities. Jt. App. at 194, 203-07; Pet. App. at 2a-3a, 6a.

Section 760, however, requires unions to secure a nonmember's "affirmative authorization" ("consent") before

---

[1] "[A]n 'agency shop' [is an] arrangement, whereby every employee represented by a union – even though not a union member – must pay to the union, as a condition of employment, a service fee equal in amount to union dues." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 207, 211 (1977).

using his or her compelled fees on political campaigns. Pet. App. at 81a. The WEA stipulated with the Washington State Public Disclosure Commission ("PDC"), the state agency charged with enforcing Washington's campaign finance laws, including § 760, that the union violated § 760 by failing to obtain that consent.[2] Jt. App. at 13-14; Pet. App. at 5a.

This Court's rulings require "the government and union . . . to provide procedures that minimize th[e] impingement [of the agency shop on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.20 (1986) (citing *Ellis v. Ry. Clerks*, 466 U.S. 435, 455 (1984)).

The WEA developed, separate from § 760, a "*Hudson*" process to address the fact that the dues-equivalent fees it collects from nonmembers exceed what WEA needs for collective bargaining. Jt. App. at 99-100, 116, 194-207; Pet. App. at 3a-4a. The excess amounts are referred to in the case law and in the WEA's "*Hudson*" notice as "nonchargeable expenses." Jt. App. at 197, 203-05, 207; Pet. App. at 3a. These nonchargeable expenses include and exceed the political contributions and expenditures covered by § 760.[3] Jt. App. at 212; Pet. App. at 3a.

Under the WEA's *Hudson* process, the union sends out a notice and nonmembers must affirmatively object within thirty days to receive a refund of the part of the dues-equivalent fees

---

[2]Although it held the statute unconstitutional, the Washington Supreme Court also determined that the WEA had failed to obtain the affirmative authorization required by § 760. Pet. App. at 11a.

[3]Only two of the fifteen nonchargeable code descriptions used by the WEA to calculate nonchargeable expenses cover § 760 activities. Jt. App. at 209, 215-17.

that the union admits is nonchargeable.[4] Jt. App. at 198; Pet. App. at 3a-4a. Nonmembers who fail to timely object receive no refund and must subsidize the union's nonchargeable expenses, including the political campaigns covered by § 760. Jt. App. at 197, 198; Pet. App. at 4a.

At issue in this case are the § 760 fees taken from the silent nonmembers that the WEA uses for partisan political campaigns without the nonmembers' consent.[5]

In school districts where an agency shop clause is in effect, all new employees begin paying nonmember dues-equivalent fees, unless they sign a membership enrollment form and authorize dues to be deducted from their wages. Jt. App. at 28-29, 34. Members must agree to "subscribe to the goals and objectives of the WEA." *Washington* Trial Exhibit ("Tr. Ex.") # 41 (Bates No. WEA 002500).

The nonunion teachers declined to join the union for various reasons including: not wanting to be part of the union, different philosophies, disagreement with the union on morals and values, differences over political issues, candidates and initiatives, wanting to choose for themselves what to support politically with their money and time, and opposition to strikes in education. Jt. App. at 49, 54-63, 65-66, 68-69. Many times, the nonunion teachers disagreed with the union's position on

---

[4]The WEA gives the nonmember three choices: 1) do nothing and "pay the full amount equal to dues paid by members"; 2) object in writing with specified information within a specified time "to use of your agency fee for nonchargeable activities," "accept" the union's chargeable fee determination as explained in the notice, and not be charged for the nonchargeable activities; or 3) object *and* challenge before an impartial arbitrator the union's calculation of the chargeable amounts and/or characterization of items as chargeable. Jt. App. at 197-98.

[5]The Washington Supreme Court construed § 760 "as requiring more than a nonresponse to a *Hudson* packet." Pet. App. at 11a.

charter schools, school choice, school vouchers, and levies increasing property taxes.

One nonunion teacher explained her disagreement with the union's position against charter schools: "What's more important, the students or maintaining a public school system that may not be as good as it could be[?]" *Id.* at 57. Another nonmember explained her reasoning process in deciding how to vote on a school levy: "I would look at what the opposite side was, ... It would depend upon what the cost was." *Id.* at 68, 69.

The WEA imposes many disadvantages on nonmembers and reminds nonmembers of these disadvantages each year in its *Hudson* notice. For example, nonmembers who pay full dues-equivalent fees are denied: 1) coverage under a $1,000,000 liability insurance policy; 2) $35,000 for attorneys' fees if a teacher is charged with a crime related to employment; 3) discounts on personal legal services, such as wills, probate, domestic relations, and real-estate matters; and 4) an attorney to defend teachers when their employer seeks to discharge them or not renew their contracts. *Id.* at 196-97. Some nonmembers get the "cold shoulder" from their member colleagues and are denied the calendar book members receive. *Id.* at 30, 50. Nonmembers are not consulted on most union matters, including when the WEA decides what position to take on ballot propositions, even though the propositions affect members and nonmembers alike. *Id.* 151-53.

Shortly after the school year begins, the WEA sends out its *Hudson* packet of approximately 100 pages to the school employees who have not signed membership enrollment forms. *Id.* at 194; *see also* Tr. Ex. # 41 (Bates Nos. WEA 002594-99, 002619-713). The packet informs the nonmembers that, if they affirmatively object to the union's spending of their dues-equivalent fees on political, ideological, and other nonbargaining activities, they will not be charged for those

costs. The packet does not mention § 760. Jt. App. at 99-100, 116, 197.

The nonmembers are given three choices. *See supra* note 4. If they fail to respond within thirty days, they "waive [their] ability to object" for that school year and are charged the full dues-equivalent fee. *Id.* at 198. The WEA requires nonmembers to object each year in order to pay only the reduced fee covering its collective bargaining or "chargeable" costs because, as explained by WEA Executive Director James S. Seibert, the union does "not . . . allow nonmembers to be permanent objectors," *id.* at 123, and just reimburse the union for its bargaining costs. *Id.* at 122.

The local associations supervise membership recruitment and must send the WEA two nonmember fee payer rosters: one on October 10, the other on December 15. *Id.* at 32; Tr. Ex. # 41 (Bates No. WEA 002510). A second *Hudson* packet is distributed in December to those "new" fee payers who are on the October and December fee rosters and were not sent the first *Hudson* packet. Jt. App. at 114-15, 157. Some nonmembers fail to respond to the *Hudson* packet because they do not receive it, the packet comes at the busiest time of the school year, they do not understand it, or they put it away for later. *Id.* at 51, 64-65, 155-57.

The WEA has numerous forms that it submits to the employees it represents throughout the school year, including forms for membership enrollment, cash member renewal, notification of cancellation, agency shop employees, WEA-PAC authorization, and NEA-Fund for Children in Public Education [NEA's PAC] authorization. *Id.* The WEA does not solicit or deduct PAC contributions from nonmembers. *Id.* at 34-35, 194-95. It also does not deduct Community Outreach dues for political education from nonmembers. *Id.* The WEA only deducts PAC contributions from members who sign a PAC membership authorization each year ("opt in"). *Id.* at 36-

39, 45. It has no forms or procedures to secure the "affirmative authorization" of nonmembers to use their fees for politics. *Id.* at 102-03, 116, 120.

Thomas Ray Baier, WEA Supervisor of Membership Systems, testified that "it wouldn't be a problem" to add a form and instructions for securing § 760 authorization to the annual Membership Enrollment Guide sent to the 360 local associations and other affiliates and employees of the WEA. *Id.* at 103. Although he asserted that changing the fee amount deducted from nonmembers' wages to comply with § 760 "could be very difficult to administer," *id.* at 108, *see also id.* at 106-10, 111-12, Mr. Baier admitted that it could be done by refunding the § 760 portion of the fee to nonmembers who do not sign § 760 authorizations. *Id.* at 110-11.

An expert witness, certified public accountant Jeffrey L. Baliban, suggested that the easiest way to comply would be to refund to a nonmember who has not authorized § 760 expenditures the portion spent on politics, just as the WEA does in refunding the nonchargeable portion in its *Hudson* process. *Id.* at 138-39. Moreover, in negotiating the terms of the lower court's § 760 injunction, the WEA decided not to obtain affirmative authorizations from nonmembers, but instead, to provide all nonmembers with an advance rebate of its § 760 expenditures. *Id.* at 189-90, 212-13.

III. The Proceedings Below

On March 19, 2001, the nonunion teachers brought this class action lawsuit to recover the part of dues-equivalent fees that the WEA collected and used for partisan political purposes without nonmembers' affirmative authorization, in violation of § 760. Jt. App. at 1; Pet. App. at 6a. In their complaint, the nonunion teachers alleged an implied private right of action under § 760, and three tort claims: conversion,

fraudulent concealment, and breach of fiduciary duty. *See* Jt. App. at 10-11; Pet. App. at 6a.

The WEA moved to dismiss. The trial court denied the motion except as to the breach of fiduciary duty claim, determined the applicable statute of limitations, and certified the nonunion teachers' class. Finally, the trial court stayed further proceedings pending an interlocutory appeal. Jt. App. at 1; Pet. App. at 6a; 47a-49a.

The WEA sought discretionary review of the trial court's denial of its motion to dismiss. The court of appeals accepted review. At the WEA's request, the court of appeals set oral argument for both this case and *Washington* before the same panel. Jt. App. at 1-2. On June 24, 2003, a 2-1 majority reversed the *Davenport* trial court and remanded the nonmembers' claims for dismissal because it held in *Washington* that § 760 is unconstitutional. Thus, "plaintiffs, as non-objecting, nonunion employees, lose standing to sue for their un-refunded agency fees." Pet. App. at 43a, *accord* Jt. App. at 2; Pet. App. at 6a-7a.

In *Washington*, a majority of the court of appeals recognized that the "only authority that a union has to compel nonmembers to pay agency fees is statutory." Pet. App. at 57a. Nevertheless, it held that § 760 was unconstitutional because the affirmative authorization requirement, or opt-in procedure, upset[s] the balance between nonmembers' rights and the rights of the union and the majority," "ignores a union's right to use non-objectors' agency fees on political expenditures," and "unduly burdens unions." *Id.* at 68a, 69a.

Chief Judge Hunt dissented. She found that even if an opt-out provision is constitutionally required,[6] that does not

---

[6] *See Abood*, 431 U.S. at 235-38, 244; *Ry. Clerks v. Allen*, 373 U.S. 113, (continued...)

support the converse, *i.e.*, that an opt-in provision such as § 760's is constitutionally barred. *Id.* at 71a-72a. She also noted that none of this Court's compelled-fee decisions held "that the Constitution *mandates* that [the] burden [of objecting] rest[s] on the employee." *Id.* at 73a.

The nonunion teachers and the State of Washington each timely petitioned for review in the Washington Supreme Court to defend the constitutionality of § 760. Jt. App. at 2, 74; Pet. App. at 2a, 7a. The court granted both petitions for review, consolidated the cases, and affirmed the court of appeals' decision. Jt. App. at 2, 74; Pet. App. at 7a, 29a.

The 6-3 majority held that the statute imposes an unconstitutional restriction on the political speech of the union, its members, and nonmembers because "a union has the [First Amendment] right to use non dissenting nonmembers' fees for political purposes." Pet. App. at 22a. The majority opined that a "presumption of dissent violates the First Amendment rights of both members and nonmembers." *Id.* at 16a.

The majority's holding rested on four points. First, that it was bound by this Court's statement in *Machinists v. Street*, 367 U.S. 740, 774 (1961), that "dissent is not to be presumed –it must affirmatively be made known to the union by the dissenting employee." Pet. App. at 13a-15a. "As the Supreme Court has held," the majority reasoned, "there is no compelled support if the union utilizes the *Hudson* procedures. Given that there is no compelled support, it does not appear that there is any governmental interference with First Amendment rights of nonmembers for § 760 to protect against." *Id.* at 23a.

---

[6](...continued)
121-22 (1963); *Machinists v. Street*, 367 U.S. 740, 770, 772-74 (1961).

Second, the majority held that *Hudson*'s opt-out or objection procedure is constitutionally required, because this Court held that a nonmember must "register his dissent to the union's political activities." *Id.* at 15a.

Third, the majority held that § 760's opt-in requirement constituted an undue burden on the union's First Amendment right to expressive association. It opined that the procedures required to comply with § 760 "would be extremely costly and would have a significant impact on the union's political activities." *Id.* at 17a. The majority also contended that the rights of nonmembers would be violated, because for "those nonmembers who agree with the union's political expenditures, [§] 760's opt-in presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues." *Id.* at 17a-18a. Although it conceded that "our state may provide greater protection to its citizens, such as dissenting nonmembers, than is provided by the federal constitution," the majority argued that "it cannot do so at the expense of the rights of other citizens, such as members and supporting nonmembers." *Id.* at 19a.

Fourth, the majority reasoned that, because § 760 "regulates the relationship between the union and [nonmember] agency fee payers with regard to political activity, the . . . analysis [in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000),] should be applied." Pet. App. at 27a. Applying strict scrutiny, the majority held that this Court's "opt-out alternative . . . reveals that protection of dissenters' rights can be achieved through means significantly less restrictive of the union's associational freedoms than [§] 760's opt-in requirement." *Id.* at 28a. "[T]hus, the statute is unconstitutional." *Id.* at 29a.

Justice Sanders, joined by Chief Justice Alexander and Justice Fairhurst, strongly dissented. First, the dissent rejected

the majority's claim that the WEA had a First Amendment right to use nonmembers' fees for politics. "[T]he majority turns the First Amendment on its head to invalidate a state statute enacted to further protect the constitutional rights of nonunion members who are required to pay agency fees as the price of their employment." *Id.* at 32a.

The dissent cited the undisputed fact that unions "have a statutory, not constitutional, right to cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount." *Id.* at 30a. "Should the legislature . . . choose to repeal the mandatory withholding provisions . . . , there would be no constitutional impediment to doing so. And no party to this proceeding claims there is." *Id.* at 31a.

Second, the dissent rejected the majority's conclusion that the opt-out procedure mentioned in *Hudson* was constitutionally required. *Id.* at 35a-36a.

> From the majority's misconstruction of the "dissent is not to be presumed" language a false "balance" requirement is invented. Other than general paeans to the right of association, the majority cites no other precedent for its holding that the "balance" between the associational rights of dissenters and non-dissenters is upset by requiring one to register assent, rather than register dissent.

Id. at 36a.

Third, the dissent categorically rejected the majority's reliance on *Boy Scouts*, because that case protects the rights of nonassociation, not the rights of organizations to compel membership or financial support. Pet. App. at 39a-41a. Section 760 "does not apply to union members[,] only nonmembers who must pay agency fees because of their *refusal* to join the union." *Id.* at 40a. "The absence of

membership defeats any claim that the regulation of statutorily required monetary support can possibly violate the right of union members to freely associate with one another for political advocacy." *Id.* at 41a.

Finally, the dissent identified both the majority's confusion and the decision's great harm: "[I]t puts in jeopardy the First Amendment right of nonmembers to refuse to associate with a union which uses their money to advance a political agenda with which they might disagree. *That* is the concern of the First Amendment in this context, as it is the even more protective concern of [§] 760." *Id.* at 41a.

SUMMARY OF ARGUMENT

Question I: In striking down § 760's affirmative authorization requirement, the Washington Supreme Court majority repeatedly misapplied and misinterpreted the First Amendment. Most notably, the majority misread this Court's case law in order to manufacture a First Amendment right for unions to use nonmembers' compelled fees to support political causes. This Court has never recognized such a right. The majority also applied strict scrutiny and profoundly overstated the burden that § 760 imposes upon unions' political speech. Either of these flaws in the majority's reasoning is sufficient to compel reversal.

While acknowledging that the authority to collect and use nonmember fees is purely statutory, the majority misapplies this Court's compelled-fee cases and transmutes the statutory right to compel fees from nonmembers' wages into a First Amendment guarantee that unions may use those fees for politics. This Court has never held that unions have a constitutional right to collect or use any fees from nonmembers, let alone fees that will be used for politics.

Nevertheless, the majority decided that unions have a constitutional right to use nonmembers' wages on politics without securing their affirmative authorization. This ruling contravenes this Court's consistent holdings that unions and individuals who associate with them have no First Amendment associational right: 1) to compel employees to join or financially support the union; 2) to collective bargaining; or 3) to payroll deduction of full union dues (and, by logical extension, nonmember fees).

Although the power to persuade is protected by the First Amendment, the power to compel conformity (and financial support) is not. Thus, it is the nonmembers, not unions and their members, who have constitutional rights at stake when it comes to the use of compelled fees to further the unions' political agendas.

Section 760's opt-in requirement is applicable only to nonmembers and places no burden on a union or its members. Because no fundamental right protected by the First Amendment is implicated, the proper level of review is the deferential, rational basis test. Section 760 clearly satisfies this test by increasing the likelihood that nonmembers' political contributions are voluntary and not compelled. Here, the State has provided the union with unique powers not given to other politically active organizations, such as the power of exclusive representation and the power to compel dues-equivalent fees from nonmembers as a condition of their employment. Requiring an opt-in procedure for political contributions from nonmembers places the union on a more level political playing field with other organizations. The union must persuade nonmembers to contribute; it may not rely on the human tendency not to act. These facts provide more than a rational basis to uphold § 760.

Another basis for the Washington Supreme Court majority's invalidation of § 760 is its misapplication to

nonmembers of the "dissent is not to be presumed" phrase this Court first used in *Machinists v. Street*, 367 U.S. 740, 744 (1961) and repeated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 n.16 (1986). *Street* addressed an overly broad injunction that prevented the union from using for politics the dues contributed by voluntary union members. This Court properly held that dissent is not to be presumed in the case of these voluntary members.

This Court's subsequent compelled-fee cases did not establish a constitutional rule that nonmembers–who have already chosen to stand apart from the union at great cost to themselves–must further object to prevent the collection and use of their fees for political activities. *Hudson* referenced *Street*'s "dissent" phrase only in connection with nonmembers' newly-recognized option to initiate a post-collection *challenge* to a union's calculation of a reduced fee before an impartial decisionmaker. This Court's decision in *Airline Pilots Ass'n v. Miller*, 523 U.S. 866, 876-78 (1998), confirms that this Court did not endorse a constitutional requirement that nonmembers must dissent to prevent the collection and use of their fees for political purposes.

Question II: Even if this Court should conclude that the "dissent" phrase applies to nonmembers, this requirement is a constitutional minimum that a union must afford nonmembers, not the constitutional maximum imposed by the majority below. States are free to erect greater protections of nonmember rights, such as repealing the union's power to collect any nonmember fees. Through § 760, Washington State provides nonmembers greater protection than constitutionally mandated. Contrary to the Washington Supreme Court's conclusion, there is nothing in this Court's precedent that establishes constitutional restrictions on the use of an opt-in system for nonmembers' political contributions.

Section 760 is a reasonable and permissible protection of nonmember rights.

Additionally, § 760 passes constitutional muster because requiring nonmembers' affirmative consent is far less burdensome on any possible First Amendment rights of unions than the limitations placed on union political solicitations by the Federal Campaign Finance Act ("FECA"), 2 U.S.C. § 441b(a). FECA prohibits unions from using their general funds for political expenditures, requires that such expenditures be made only from a segregated fund financed by voluntary contributions (an opt-in procedure), and prohibits a union from even soliciting funds from nonmembers. This Court is "unanimous" that, despite the FECA's opt-in requirement, unions and corporations have been provided a "constitutionally sufficient" opportunity to engage in political speech, express advocacy, and electioneering communication. *McConnell v. FEC*, 540 U.S. 93, 203 (2003).

If the administrative burdens associated with establishing a PAC and soliciting voluntary contributions from members do not impermissibly burden a union's First Amendment right to engage in political speech, then the much more modest opt-in requirement of § 760, which could be satisfied by requesting consent in the *Hudson* notice the union already sends nonmembers, is certainly constitutional. For this reason alone, the Washington Supreme Court's decision must be reversed and § 760 permitted to guarantee that participation in Washington politics is a matter of choice and not compulsion.

ARGUMENT

I. Labor Unions Do Not Have a Constitutional Right to Use the Wages of Nonmembers for Any Activity, Much Less to Fund the Political Agenda of the Union.

The WEA and the courts below all agree that unions have no constitutional right to collect fees from nonmembers.[7] The arguments of the unions and the Washington Supreme Court's majority are therefore premised exclusively upon a statutorily created right to collect dues-equivalent fees from nonmembers. As forcefully laid out by the dissent, "[s]hould the legislature of the State of Washington choose to repeal the mandatory withholding provisions . . . , there would be no constitutional impediment to doing so. *And no party to this proceeding claims there is.*" Pet. App. at 31a (emphasis added). Yet the Washington Supreme Court majority nonetheless transmutes this statutory right to automatically deduct fees from nonmembers' wages into a constitutional right to use those fees for politics by misapplying this Court's compelled-fee cases.

This Court has held that compelling employees to support financially their collective bargaining representative for the purposes of collective bargaining, contract administration, and

---

[7] "[A] union has no constitutional right to collect an agency fee in the first place. That rule of law is . . . undisputed . . . . [T]he right of unions to *collect* an agency fee from nonmembers . . . is established by Washington statutory law . . . ." *Davenport* Brief of Respondent WEA in Opposition at 13 (filed Aug. 14, 2006). The Court of Appeals majority admitted that "[t]he only authority that a union has to compel nonmembers to pay agency fees is statutory." Pet. App. at 57a. The Washington Supreme Court majority noted that Washington law "provides that if an agency shop agreement becomes effective, a fee that is equivalent to union dues will be deducted from the salary of employees in the bargaining unit." Pet. App. at 26a. This Court agrees that collective bargaining, which is the basis for compelling agency fees, is only a statutory right. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 313-14 (1979).

grievance adjustment is "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). This Court has never held, however, that collecting compelled fees is *constitutionally required.* In fact, nearly half of the states do not authorize the assessment of compelled fees at all in the public sector. The other states, including Washington, have granted unions a statutory right to take agency fees from nonmembers. That grant differs in form and scope from state to state.[8]

Nevertheless, the Washington Supreme Court majority decided that unions have a constitutional right to use nonmembers' wages on politics without securing their affirmative authorization. This ruling directly conflicts with this Court's consistent holdings that unions and individuals who associate with them have no First Amendment associational right: 1) to compel employees to join or

---

[8]Like § 760, some states' agency shop statutes require voluntary political contributions to be separate from the compelled fee. *E.g.*, 5 Ill. Comp. Stat. Ann. 315/3(g) (West 2005); 115 Ill. Comp. Stat. Ann. 5/11 (West 1998). Others prohibit the use of nonmember fees on political activities or contributions. Md. Code Ann., Educ. § 6-504(d)(3)(iv)(2) (2006); Mont. Code Ann. §§ 39-31-402(3), 39-32-109(2)(d) (2005). Not all state compelled-fee statutes allow the union to require nonmembers to pay an amount equal to dues. Some limit the amount to the costs of representing the members of the bargaining unit, Md. Code Ann., Educ. §§6-504(b), (d)(1) & (d)(3)(iv)(1) (2006). Others limit the fee to no more than 85% of dues. Minn. Stat. Ann. § 179A.06(3) (West Supp. 2006); N.J. Stat. Ann. § 34:13A-5.5(b) (West Supp. 2005); Vt. Stat. Ann. tit. 3, §§ 902(19), 1011(4) (2003). Still others limit the fee to the constitutionally chargeable amount. N.M. Stat. Ann. § 10-7E-4(J) (West Supp. 2003); Pa. Cons. Stat. Ann. §§ 1102.2, 1102.4 (West 2006). Some even allow bargaining unit members to rescind or deauthorize the compelled-fee requirement. Cal. Gov't Code §§ 3515.7(d), 3546(d)(1) (West Supp. 2006); Cal. Pub. Util. Code § 99566.1(d)(1) (West Supp. 2006); Wis. Stat. Ann. §§ 111.02(10m), 111.70(1)(n) & (2), 111.81(16), 111.85(2)(a) (West 2006).

financially support the union; 2) to collective bargaining; or 3) to payroll deduction of full union dues (and, by logical extension, nonmember fees).

The First Amendment rights of labor unions and their members recognized by this Court are the rights of workers to peacefully assemble, to discuss improvement of their own working conditions, and to petition government – rights enjoyed by all Americans. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-65 & n.2 (1979). A union's constitutional right of association is simply that: the right to associate. This Court has refused to expand these rights because to do so would infringe on the First Amendment rights of individual workers or the authority of the state to protect the general public, including nonunion workers. There is nothing in the union's right to associate that includes a constitutional right to use for politics the compelled fees of nonmembers who have already demonstrated their objection to associating with the union by declining membership.

More than fifty years ago, organized labor, seeking to compel employees to join or financially support unions, challenged state Right to Work laws[9] "as violations of the right of freedom of speech, of assembly, and of petition guaranteed unions and their members by the First Amendment."[10] This

---

[9]A Right to Work law guarantees that no person can be compelled, as a condition of employment, to join or not to join, or to pay dues or fees to a labor union. *See* section 14(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §164(b) (allowing state prohibitions of compelled union membership or financial support); Okla. Const. art. 23, § 1A; and the twenty-one other constitutional and statutory Right to Work provisions listed in Pet. App. at 31 n.3; *see also* section 9(e) of the NLRA, 29 U.S.C. § 159(e) (providing for deauthorization of compelled union membership or financial support requirements in non-Right to Work states).

[10]*Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 528-

(continued...)

Court responded that "[n]othing in the language of the [Right to Work] laws indicates a purpose to prohibit speech, assembly, or petition." *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 530 (1949). It also specifically rejected the argument adopted by the majority below that the right to association includes a constitutional right to compel nonmembers' support to achieve an effective union. *Id.*

This Court has also held that collective bargaining is not guaranteed by the First Amendment. *Smith*, 441 U.S. at 464-65 & n.2. A union's rights of association cannot be stretched to impose a constitutional obligation on the government to recognize a union, bargain with it, or allow the union to process grievances. *Id.*

Similarly, just as collective bargaining is not a fundamental right, neither is the deduction of union dues ("dues check off") guaranteed by the First Amendment. In *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283 (1976), this Court held that the First Amendment imposes no obligation on the government to deduct union dues or fees from public employees' wages.[11]

These cases teach that labor union officials have no First Amendment right to use the government to collect from their own members money to pay for collective bargaining. It

---

[10](...continued)
29 (1949) (internal quotation mark omitted); *accord Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 540 (1949); *see also Ry. Employes' Dep't v. Hanson*, 351 U.S. 225, 233 (1956).

[11]*See also South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1256-57 (4th Cir. 1989) (the constitution does not entitle unions to the funds necessary to realize all the advantages of First Amendment freedoms); *Brown v. Alexander*, 718 F.2d 1417, 1421, 1423, 1429 (6th Cir. 1983) (a burden impairing the effectiveness of local unions was constitutionally permissible).

follows that unions have no First Amendment right to use the government to take money from nonmembers and use it for politics without their permission. As this Court has repeatedly recognized:

> "[T]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." . . . . Unions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns.[12]

Although the power to persuade is protected by the First Amendment, the power to compel conformity (and financial support) is not. Thus, it is the nonmembers, not unions and their members, who have constitutional rights at stake when it comes to the use of compelled fees to further the union's political agenda.[13]

---

[12]*Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991) (quoting *Abood*, 431 U.S. at 222) (citation omitted); *accord Lehnert*, 500 U.S. at 511, 514-18; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 (1986) ("We reiterate . . . that the agency shop itself impinges on the nonunion employees' First Amendment interests.").

[13]*See Hudson*, 475 U.S. at 301-10; *Abood*, 431 U.S. at 234-37. Thomas Jefferson would agree. He wrote: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. Brant, *James Madison: The Nationalist* 354 (1948); (quoted by this Court in *Abood*, 431 U.S. at 234 n.31 and *Hudson*, 475 U.S. at 305).

The Washington Supreme Court majority was similarly mistaken in its holding that § 760 restricts the First Amendment associational rights of the WEA and nonmembers who allegedly seek to support its political causes. That erroneous determination is premised upon a radical and unprecedented expansion of this Court's decision in *Boy Scouts*, which held that the First Amendment protects the right of an organization not to associate with individuals whom the group does not desire to include among its membership. The majority transformed *Boy Scouts*' right of nonassociation into a previously unknown associational right authorizing an organization to use for its own political purposes the funds of individuals who have specifically chosen not to associate with that group.

As the dissent below recognized, the freedom of association cannot possibly be implicated under such circumstances because no association exists between an organization and those individuals who have affirmatively elected not to join. *See* Pet. App. at 39a. In other words, because the nonmembers have explicitly chosen not to become union members, and because the union does not have the right to compel membership,[14] there is no associational connection between the union and the nonmembers who are compelled by state law to pay agency fees. Thus, *Boy Scouts*' framework protecting a group's associational rights is wholly inapplicable here.

Accordingly, this Court must reverse the Washington Supreme Court and hold that § 760's protection of nonmembers' political rights, by requiring that they authorize

---

[14] *See, e.g., Lincoln Fed.*, 335 U.S. at 531 ("There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies.").

a union's use of their compelled fees for politics, does not violate the First Amendment rights of unions and their members.

II. Because There Is No First Amendment Right of Unions and Their Members to Collect or Use Nonmembers' Fees for Politics, Section 760 Need Only Satisfy the Rational Basis Test, Which It Does.

The Washington Supreme Court majority erred in concluding that § 760 is a restriction on constitutionally protected political speech that must be evaluated under strict scrutiny. The First Amendment is not implicated by § 760's affirmative authorization requirement because, as discussed above, there is no constitutional right for unions to collect agency fees from nonmembers, or to use those fees that it does collect for political purposes.

The WEA's right to assess agency fees is purely statutory in nature, and the State of Washington is therefore free to restrict that right in any way that it deems appropriate, or even to extinguish it entirely, as Indiana did several years ago, without any constitutional impediment. Ind. Code Ann. § 20-7.5-1-6 (2006). The majority's assertion that this Court "has held that a union has the right to use nondissenting nonmember fees for political purposes," Pet. App. at 22a (citing *Abood*, 431 U.S. at 240), is thus thoroughly misplaced.

Section 760's opt-in requirement, applicable only to nonmembers, places the same burden on a union that already exists on everyone in a free society. No candidate is entitled automatically to the citizens' votes or money. Certainly labor unions are no exception to the political rules that apply to everyone else. Here, there is no prohibition on speech, no limit on expenditures or even on contributions. There is merely a procedural requirement for obtaining political contributions from workers who have rejected union membership. Therefore

§ 760 needs to satisfy only a rational basis review. *Lyng v. UAW*, 485 U.S. 360, 368 & n.6, 370-71 (1988).

What WEA demands is not just a constitutional right to effective advocacy of its viewpoints. It demands that the political playing field be tilted in its favor. That right simply does not exist. "The First Amendment . . . provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith*, 441 U.S. 463, 464-65 (1979). Moreover, not all means of expression have been foreclosed.

The rational basis for enacting § 760 is to ensure that everyone, including unions, has to secure the affirmative authorization from outsiders or nonmembers for political funds. The need for government to level the playing field is consistent with this Court's view that the enhancement of the speech of some elements of our society by the government is wholly foreign to the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). However, as one noted professor of economics explained:

> Citizens of a free country are free to spend their own money on the political causes and candidates they wish to support. But in the 60 years since the enactment of the National Labor Relations Act, union officials have extracted hundreds of billions of dues dollars as a condition of employment from the paychecks of America's working people. No religious, trade, or any other private association, has the same power to confiscate the earnings of unwilling individuals.[15]

---

[15]Charles W. Baird, *The Tip of the Iceberg: PACs & the Forced-Dues Base of Big Labor's Political Machine*, The Smith Center for Private Enterprise Studies (2001) http://www.cbe.csueastbay.edu/~sbesc/tipoftheiceberg.html (last visited Nov. 1, 2006).

Here, the State of Washington provides a funding benefit to unions by permitting them to collect dues-equivalent fees from nonmembers. The State, in § 760, places a procedural condition on the use of those fees for politics. Section 760 is analogous to the conditional funding statutes regularly upheld by this Court against constitutional challenges.

Even if § 760 regulates the WEA's political speech, it does so indirectly and properly by placing a reasonable condition on the funding of exclusive bargaining through the automatic deduction of dues-equivalent fees from nonmembers' wages. When the Constitution restrains direct government regulation, government may nevertheless condition its assistance in ways that indirectly regulate that activity. For instance, even if the 21st Amendment eliminates Congress' power to regulate drinking ages, Congress may still condition state highway funding on states' adoption of minimum drinking-age laws. *South Dakota v. Dole*, 483 U.S. 203 (1987). States may not forbid sectarian education, but states may elect to exclude religious education from private education funding entitlements. *Locke v. Davey*, 540 U.S. 712 (2004).

States may not forbid abortions, but state-run hospitals may refuse to perform abortions. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 507-11 (1989). The government's "refusal to fund protected activity, without more, cannot be equated to the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (upholding limit on use of federal funds to reimburse cost of abortions under Medicaid program). Government may not regulate speech on abortion, but may require elimination of abortion-related content from state-funded family-planning education. *Rust v. Sullivan*, 500 U.S. 173, 192-200 (1991).

Congress did not impose an impermissible condition on subsidies to public libraries by requiring libraries to use

Internet filters to block obscenity. *United States v. Am. Library Ass'n*, 539 U.S. 194, 210-12 (2003). Government, though disabled from restraining the political activity of nonprofit organizations, may restrict the tax deductibility of donations to charities on the condition that the charities abstain from political activity. *Regan v. Taxation with Representation*, 461 U.S. 540, 545-46 (1983).

Similarly, although the State of Washington may not forbid unions from engaging in political activity, the State can condition its assistance–in the form of compelling union subsidies from nonmembers–on the union acquiring a nonmember's consent before the union uses his or her state-compelled fees on political activity. If the union deems these conditions too onerous, it is free to reject that unique assistance and solicit funds like any other politically active group.

Even if the State of Washington had adopted a scheme that might arguably implicate a union's First Amendment interest, such as an opt-in requirement for the union to use its *members*' dues for politics, such a law would be subject to intermediate scrutiny, not the strict scrutiny the Washington Supreme Court majority used to strike down § 760. *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1250-53 (6th Cir. 1997) (holding that a statute that required unions to obtain annual consent from political contributors did not warrant strict scrutiny because the regulation was content-neutral, and concluding that the measure withstood intermediate scrutiny).

The Washington Supreme Court majority nevertheless erroneously concluded that § 760's affirmative authorization requirement imposes an unconstitutional burden on the First Amendment rights of the union and nonmembers who allegedly support the union's politics. Pet. App. at 17a-18a. Section 760's opt-in provision creates a *de minimis* limitation on the union's statutory right to collect agency fees and on any

other right that it may have to use those fees for political speech.

Furthermore, a union may satisfy § 760's affirmative authorization requirement through a variety of procedures, including by telephone or e-mail, *see* Pet. App. at 17a, or by simply including an additional postcard in the union's annual *Hudson* mailing to nonmembers, as a union witness admitted. Jt. App. at 110-11. Contrary to the Washington Supreme Court majority's exaggerated prose, these means of obtaining authorization constitute, at most, a minor administrative task.

In similar circumstances, the Sixth Circuit found the administrative burdens of an opt-in requirement to be minimal:

> [R]equiring the unions to make space in their files or databases for the inclusion of one more piece of information seems minimal, certainly a burden insufficient to rise to the level of a constitutional violation. Similarly, the suggestion that asking people to check a box once a year unduly interferes with the speech rights of those contributors borders on the frivolous.

Miller, 103 F.3d at 1253.

The only "hurdle" that § 760 imposes on a union is a slight administrative one–that it must make "individual contact with each nonmember," Pet. App. at 17a, to get the nonmember's actual consent to use his or her fees for politics. As both a matter of fact and of law, the majority below errs in finding that the simple act of asking permission is an "insurmountable . . . hurdle." *Id.* at 16a.

It is difficult to call this a "hurdle" at all, much less an "insurmountable"one. The "hurdle" is the same one faced by every political interest group – having to ask contributors for

contributions. The "hurdle" is even smaller for the WEA because it already has to notify all nonmembers annually of their *Hudson* rights.

This Court has repeatedly called it a "corruption" of the political process to use a citizen's money for a candidate or cause that he does not support. *See, e.g., Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 656, 659-60 (1990); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 258-60 (1986). Under either a rational basis or intermediate scrutiny test, § 760 survives because it helps eliminate corruption in politics and promotes voluntary political participation. These are worthy goals for government. The "burden" imposed by § 760 to prevent this corruption is slight and is more than rationally related to the State's interests.

In addition to misreading this Court's cases, the majority below also ignores the "real world" ramifications of setting the default to opt out. Whether political spending, class actions, or 401(k) retirement plans are involved, setting the default to opt out rather than opt in is intended to maximize participation in the activity while eliminating the need for voluntary support of it. The result of an opt-out default in this case is to compel nonmembers' unwitting, accidental or unwilling support of union political spending, which the State may rationally conclude corrupts the political process.

This was demonstrated in *FEC v. National Education Ass'n ("NEA")*, 457 F. Supp. 1102 (D.D.C. 1978), a case involving WEA's parent affiliate, the National Education Association. The court there recognized the self-serving and coercive nature of an opt-out system similar to the one imposed on nonmembers by the WEA and majority below–in which nonmembers must act to prevent the use of their deducted wages for political activities. *Id.* at 1107-10. After switching from opt in to opt out, the union in *FEC* collected

400% more political money from its members.[16] The court concluded that changing the default from opt in to opt out inherently "results in some unknowing, and therefore involuntary, contributions." *Id.* at 1107. "In this Court's view, 'knowing free-choice' means an act intentionally taken and not the result of inaction when confronted with an obstacle." *Id.* at 1109, (citing *Pipefitters v. United States*, 407 U.S. 385, 439 (1972)).

The State has a rational basis to enforce § 760. Numerous studies in the fields of psychology and behavioral economics confirm the power of human inertia: because deviating from the status quo position requires action, people often irrationally refrain from choosing options that are of objective benefit to them.[17] The State may rationally mandate the default

---

[16]This case involved union members, who have clearly authorized the union to speak for them. *NEA*, 457 F. Supp. at 1103. Here, the question is whether the "dissent is not to be presumed" or opt-out impingement is warranted for nonmembers, who have chosen to stand apart and have given the union no authority to speak for them on any issue, especially not any political or other nonbargaining issues.

[17]*The Marketplace of Perceptions*, Harv. Mag., Mar.-Apr. 2006, p. 50, Craig Lambert, at http://www.harvardmagazine.com/on-line/030640.html (last visited Nov. 1, 2006). For example, many workers fail to opt in to their employer's 401(k) retirement plan even though they are being offered, in essence, "free money." *The Influence of Automatic Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement*, Employment Benefit Research Institute, Issue Brief #283, July 2005, *available* at http://www.ebri.org/pdf/briefspdf/EBRI_IB_07-20054.pdf (last visited Nov. 1, 2006). Former U.S. Treasury Secretary Lawrence Summers recognized this fact of life, and stated:

> We pushed very hard for companies to choose opt-out [automatic-enrollment] 401(k)s rather than opt-in [self-enrollment] 401(k)s. In classical economics, it doesn't matter. But large amounts of empirical evidence show that defaults *do* matter, that people are inertial, and whatever the baseline

(continued...)

setting for nonmembers' political contributions to be set at opt in to protect their First Amendment rights of nonassociation and political freedom. Setting the default to opt in also prevents the corruption of the political process that occurs when the default is set to opt out, a default that maximizes compelled political support.[18]

Section 760 does not impair an individual nonmember's ability to support a union's politics. It allows unions to persuade nonmembers to support voluntarily their partisan political spending by giving affirmative authorization. It only reduces a union's power to compel financial political support from nonmembers through the opt-out system that inherently fails to indicate voluntary support. *See NEA*, 457 F. Supp. at 1107-09.

---

[17](...continued)

settings are, they tend to persist.

The Marketplace of Perceptions at 55.

For similar reasons, Congress recently passed the "Pension Protection Act of 2006," which reset the default to encourage employers to automatically enroll employees in 401(k) plans unless they affirmatively opt out. *See* 26 U.S.C. § 401(13) (West, WESTLAW through P.L. 109-279 approved Aug. 17, 2006); Department of Labor "Proposed Regulation Relating to Default Investment Alternatives Under Participant Directed Individual Account Plans," Fed. Reg.: Sept. 27, 2006 (Vol. 71, No. 187), 29 C.F.R. Part 2550 at 56806.

[18]*Cf. Elrod v. Burns*, 427 U.S. 347, 370-72 (1976) (plurality opinion) (the First Amendment protection of individual belief, association, and the unfettered and free judgment on matters of political concern, at least in the setting of public employment, subordinates any First Amendment protected political campaigning and management rights); *accord Broadrick v. Oklahoma*, 413 U.S. 601, 606 (1973); *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 564-66 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 99-103 (1949) (cases upholding the far more restrictive Hatch Act, 5 U.S.C. § 7324, and state "little Hatch Acts," against claims that they violate the political rights of union members and others).

Accordingly, this Court must reverse the Washington Supreme Court because it applied strict scrutiny, instead of a rational basis, to § 760. Under a rational basis analysis § 760's protection of nonmembers' political rights does not violate the First Amendment rights of unions and their members.

III. This Court's "Dissent Is Not to Be Presumed" Phrase Applies Only to Voluntary Union Members.

A primary basis for the Washington Supreme Court majority's flawed invalidation of § 760 is its misapplication to ***nonmembers*** of the "dissent is not to be presumed" phrase this Court first used in *Street*, 367 U.S. at 774, and repeated in *Hudson*, 475 U.S. at 306 n.16. *See* Pet. App. at 13a-16a, 22a-23a.

The majority declared that "the burden [is] on the dissenting nonmember to *assert* his or her First Amendment rights." It is not "constitutionally permissible for § 760 to shift the burden to the union to *protect* the First Amendment rights of dissenting nonmembers." Pet. App. at 16a. However, that constitutional interpretation is not supported by the factual context of either *Street* or *Hudson*.

The majority also failed to recognize that this Court's refusal in *Street* to presume that *voluntary union members* dissent from a union's political and ideological activities does not logically apply to nonmembers. Employees who have refused to join a union and authorize it to act for them have already registered their dissent by virtue of their nonmembership, despite having to suffer the disadvantages that unions impose on nonmembers.[19]

---

[19]*See Minnesota State Bd. for Comty. Colleges v. Knight*, 465 U.S. 271, 277 n.4, 278-79 (1984) (nonmembers not allowed to participate in the "meet and confer" process because only union members, as selected by the

(continued...)

Street was a class action in which the state court certified a mixed class of both union members and nonmembers threatened with discharge for not joining the union. *Machinists v. Street* 108 S.E.2d 796, 798-99 (Ga. 1959) The state court enjoined the unions and employers "from enforcing . . . the union shop agreements . . . and from discharging [employees] for refusing to become [union] members" or pay dues, unless the union withdrew from political and ideological activities. *Id.* at 803.

These rulings by the state court provide the context for this Court's statement in *Street* that "dissent is not to be presumed." The meaning of that phrase is readily apparent in light of the injunction. By enjoining *all* enforcement of the union shop clause until the union withdrew from all political and ideological activities, the Georgia state courts presumed the dissent of all employees–including voluntary union members who, by joining, had given the union the authority to speak for them in all matters, including political and ideological matters. *See Street*, 367 U.S. at 791-92 (Black, J., dissenting).

---

[19](...continued)
union, could serve as faculty representatives for the "meet and confer" committees); *NLRB v. Fin. Inst. Employees*, 475 U.S. 192 (1982) (nonmembers not entitled to vote in union affiliation elections); *Kidwell v. Transp. Commc'n Int'l Union*, 946 F.2d 283 (4th Cir. 1991) (unions may place employees in the "Hobson's choice" of protecting their First Amendment rights not to support the union's politics by being nonmembers or protecting their participation in the setting of their conditions of work by being members, but not both; nonmembers are prohibited from voting on the members of the negotiating team, from participating in the resolution of disputes over employment conditions, and from voting on their terms and conditions of employment that the union negotiates); *Standard Fittings Co. v. NLRB*, 845 F.2d 1311 (5th Cir. 1988) (nonmembers not entitled to vote in contract ratification elections); *see* additional disadvantages discussed *supra* at 6.

This Court reversed because the injunction made no distinction between voluntary members and those compelled to join the union.[20] Importantly, this Court later explained that the Georgia courts' broad injunction violated the associational rights of "union *members* who do wish part of their dues to be used for political purposes . . . 'without being silenced by the dissenters.' [*Street*, 367 U.S.] at 772-73." *Abood,* 431 U.S. at 238 (emphasis added, other citations, and footnote omitted).

Presented with litigants who included union members seeking broad relief to enjoin all union political activities, this Court understandably required a showing that, to be entitled to relief, those union members must have "affirmatively made known" their objections to the union. 431 U.S. at 238. This Court derived the remedy in *Street* "not from constitutional limitations on Congress' power to authorize the union shop, but from the [statute] itself." 367 U.S. at 771. The "dissent is not to be presumed" doctrine is a statutory limitation under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, not a constitutional one that applies to nonmembers in all cases.

Later, in both *Abood,* 431 U.S. at 213 n.2, and *Ellis,* 466 U.S. at 439 n.2, this Court was again presented with mixed groups of employees that included both union members who objected to supporting the union's political and ideological activities and nonmembers who also objected but did not

---

[20]There is no difficulty in distinguishing voluntary members from compelled nonmembers in this case, because the option of remaining a nonmember is clearly set forth in the contract clause authorizing the compelled financial support and the annual *Hudson* notice the WEA sends nonmembers. Moreover, § 760, which only applies to nonmembers, does not involve the two types of employees present in *Street*, but only one distinct type of employee–the nonmember who has already chosen to stand apart from the union.

challenge the "objection requirement."[21] Accordingly, in those cases this Court merely repeated its phrase from *Street* that dissent is not presumed. By definition, nonmembers have already "object[ed] to public-sector unions as such," one of the bases of objection stated in *Abood*, 431 U.S. at 211.

In *Hudson*, there was no need for nonmembers to "dissent" within the meaning of *Street*. Unlike the collective bargaining agreement in *Street*, which required the payment of full union dues, the collective bargaining statute and agreement in *Hudson* authorized the public employer to exact from nonmembers' wages only the "proportionate share of the costs of the collective bargaining process and contract administration," not full union dues.[22] *Hudson*, 475 U.S. at 295 & n.1 (quoting Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983, repealed 1984)); *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1199-1200 (7th Cir. 1984) (Flaum, J., concurring). Accordingly, the union initially calculated the "proportionate share" for all nonmembers as 95% of full union dues. *Id.* 475 U.S. at 295-96.

---

[21] None of the *nonmember* employees involved in this Court's compelled-fee cases has ever challenged the "requirement" that objection to subsidizing the unions' political, ideological, and other nonbargaining expenses is a condition of reducing the amount of fees being deducted from his or her wages. Indeed, unlike the nonunion teachers here, the nonmembers in the prior cases had made their objections known to the unions in one way or another. *Airline Pilots Ass'n v. Miller*, 523 U.S. 866, 869 (1998); *Lehnert*, 500 U.S. at 513; *Hudson*, 475 U.S. at 297; *Ellis v. Ry. Clerks*, 466 U.S. 435, 439 (1984); *Abood*, 431 U.S. 212-14; *Allen*, 373 U.S. at 118-19; *Street*, 367 U.S. at 744; *but see Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1532 (6th Cir. 1992); *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258 (9th Cir. 1992) (class of nonobjecting nonmembers).

[22] The Washington statute, Wash. Rev. Code §§ 41.59.100 & 41.56.122(1), authorizes the employer to require or deduct full dues-equivalent fees from nonmembers.

Thus, a requirement for an affirmative objection ("dissent") to the exaction of dues-equivalent fees, including monies for political and ideological purposes, was not and could not have been adjudicated in *Hudson*. The Court in *Hudson* required labor unions, *for the first time*, to provide nonmembers with a formal opportunity to challenge the amount of a reduced fee before an impartial decisionmaker. 475 U.S. at 307 & n.19. *Hudson* referenced *Street's* "dissent is not to be presumed" requirement only in connection with nonmembers' newly-recognized option to initiate a post-collection *challenge* to a union's calculation of a reduced fee before an impartial decisionmaker. 475 U.S. at 306 n.16.

It makes perfect sense to require nonmembers, like all litigants, to take affirmative steps to invoke the quasi-adjudicative process required by *Hudson*. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 877-78 (1998); *accord id.* at 876 n.4. *Hudson* demonstrates that the affirmative "objection" nonmembers must make is to "challenge" the reduced fee calculation before the "impartial decisionmaker," not to register dissent to the collection of fees for undisputedly political and ideological activities, as the majority below maintains.

Indeed, where *Hudson* speaks of the nonmembers' burden to raise an objection, it juxtaposes this requirement against the union's retention of the burden of proof,[23] which is operative only in an adversarial proceeding that a nonmember institutes before an "impartial decisionmaker" or a court. It would make no sense for a union to calculate a reduced fee for nonmembers and then be required to assume that all nonmembers object to that calculation and challenge it. Thus,

---

[23] "[T]he nonunion employee has the burden of raising an objection but the union retains the burden of proof: . . . the burden of proving such proportion." *Hudson*, 475 U.S. at 306 (footnote and citations omitted).

the "objection requirement" only arises when particular nonmembers wish to challenge the reduced fee calculation before the impartial decisionmaker.

This Court's subsequent decision in *Miller*, also involving only nonmembers, confirms that *Hudson* did not endorse a constitutional requirement that nonmembers dissent in order to prevent the union from using their wages for politics and other clearly nonchargeable activities:

> An "agency-shop" arrangement permits a union, obliged to act on behalf of all employees in the bargaining unit, to charge nonunion workers their fair share of the costs of the representation. The purposes for which a union may spend the "agency fee" paid by nonmembers, however, are circumscribed by the First Amendment. . . . In . . . *Hudson* . . . we held that the First Amendment requires public-employee unions to accord workers who object to the agency fee "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker."
>
> . . . In the action now before us, nonunion pilots challenged the agency fee collected by the Union.

Miller, 523 U.S. at 868-69.

Like *Hudson*, *Miller* always mentions "objection" or "dissent" in the context of a "challenge" to the union's calculation of the chargeable amount, and the invocation of the impartial decisionmaker process or civil litigation. *Id.* at 876 n.4, 878, 889-90. Unlike the Washington Supreme Court majority, *Miller* refused to turn the shield of *Hudson* protecting the nonmember into a dagger wielded by the union to slash nonmember rights. "We resist reading *Hudson* in a manner that might frustrate its very purpose, to advance the swift, fair, and final settlement of objectors' rights." *Id.* at 877.

The majority below misread this Court's cases and wrongly held that once a state imposes a compelled-fee requirement on nonmembers, the Constitution requires it to only use an opt-out mechanism to prevent forced political subsidies. *Street* and *Hudson* did not create a constitutional requirement that nonmembers must always be presumed to assent to such speech unless they affirmatively object, a requirement this Court has never established.[24]

Interpreting a nonmember's silence as "consent" for compulsory political and ideological spending is inconsistent with the requirement that the government "tread with sensitivity in areas freighted with First Amendment concerns," *Hudson*, 475 U.S. at 303 n.12, and refrain from "hostility–or favoritism–towards the underlying message expressed," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1991).

In this delicate First Amendment context, the burden to demonstrate that the silent nonmember supports the union's political and ideological speech must rest with the solicitor of the funds, not the silent nonmember. Political support must always require an affirmative action, just as the Constitution cannot condone an election in which all nonvoters are presumed to vote for the Democratic candidate unless they affirmatively vote for the Republican.

This Court should reverse the majority's decision because it was based on a fundamental misapplication of the "dissent

---

[24] The Sixth Circuit recognized the importance of the default opt-in setting for political matters. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997) ("[Michigan's opt-in requirement] both reminds those persons that they are giving money for political purposes and counteracts the inertia that would tend to cause people to continue giving funds indefinitely even after their support for the message may have waned."); *accord Lutz v. Machinists*, 121 F. Supp. 2d 498, 506 (E.D. Va. 2000)("what is really at stake here is whether the union can collect more money as a benefit of the decisionmaker's inertia").

is not to be presumed" phrase, and clarify that nonmembers need not affirmatively object to paying the political and other nonbargaining portion of the compelled fees, but only to a union's calculation of that portion.

IV. Even if the "Dissent Is Not to Be Presumed" Phrase Applies to Nonmembers, the States Can Provide Statutory Protections to Nonmembers That Exceed the Constitutional Minimum Without Violating the Union's First Amendment Rights.

Section 760's opt-in protection for nonmembers is faithful to this Court's objective in *Abood* and *Hudson*: "preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237).

The existence of a constitutional floor protecting First Amendment rights of nonmembers does not provide unions with heretofore nonexistent constitutional rights. In dissent, Justice Sanders properly criticized the Washington Supreme Court majority for distorting this Court's compelled-fee cases, "delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree[,] to do the opposite: limit the State's ability to protect such dissenters." Pet. App. at 34a (dissent).

The majority erred in treating the "dissent is not to be presumed" phrase as delineating the maximum, instead of a minimum, protection required by this Court to protect the First Amendment rights of silent nonmembers. This is contrary to this Court's explanation that *Hudson* "outlined a minimum set of procedures by which a union in an agency-shop relationship

could meet its requirement under *Abood*." *Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990).

Even *Hudson* referred to these protections as "part of the 'constitutional' minimum." 475 U.S. at 308 n.21. This is consistent with this Court's long history of allowing the states to provide their citizens greater protections than the minimums the Constitution provides.[25] Pet. App. at 32a-34a (dissent).

Because unions have no constitutional right to compel nonmembers to pay fees, the state imposes no unconstitutional burden on unions when it regulates the relationship between unions and nonmembers and establishes procedures for the union's use of agency fees. Because "[t]he only authority that a union has to compel nonmembers to pay agency fees is statutory," Pet. App. at 57a (*Washington* court of appeals' majority opinion), the state can prohibit entirely or restrict that authority without interfering with a union's constitutional rights. *See Lincoln Fed.*, 335 U.S. at 529-31.

---

[25] *See, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005) (states may limit the use of eminent domain if they find that the protections the Constitution affords are not effective enough); *Locke v. Davey*, 540 U.S. 712, 725 (2004) (states may implement more procedures to protect the rights of religious exercise so long as free exercise of religion is not violated); *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (states may allow citizens to send their children to schools of their choice, including religious schools, and to spend government education grants there); *California v. Ramos*, 463 U.S. 992, 1014 (1983) (states can provide greater protections in their criminal justice system than the Constitution requires); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (states may expand rights beyond the minimum protection the Constitution offers); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (states may offer additional police procedures to more effectively protect a suspect's freedom from self-incrimination than the Constitution requires); *Skinner v. Oklahoma*, 316 U.S. 535, 539-40 (1942) (federal system allows states reasonable latitude to adopt statutes that protect individual rights).

Just as § 760's opt-in provision does not unduly burden a union's speech, it does not impose an unconstitutional burden on nonmembers who must affirmatively opt in to have their agency fees fund the union's political activities. Many states do not even authorize unions to collect agency fees from nonmembers.[26] In those states, if nonmembers wish to contribute to a union's political efforts, they must affirmatively act, proactively approaching the union and voluntarily contributing money to its causes.

This "burden" on nonmembers is significantly more demanding than that imposed by § 760's opt-in provision, which merely requires nonmembers to respond affirmatively to a union's request for authorization to use for politics fees automatically deducted from the employees' paychecks. *See Miller*, 103 F.3d at 1253 ("the suggestion that asking people to check a box once a year unduly interferes with the speech rights of those contributors borders on the frivolous"). Because § 760 provides nonmembers with a simple and streamlined procedure for contributing to unions' political causes, it is fully consistent with the First Amendment.

Accordingly, the decision of the Washington Supreme Court must be reversed and § 760 reinstated to protect the rights of nonmembers to participate in Washington politics as a matter of choice and not compulsion.

---

[26]In fact, many states have enacted statutes *prohibiting* compulsory union fees. These states, known as "right-to-work" states, include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming and the territory of Guam. *See* Pet. App. at 31 n.3 (dissent).

V. Section 760's Limits on Using Silent Nonmembers' Wages for Politics Are Less Restrictive of Any Possible Union First Amendment Rights Than the Limits Placed on Unions by the Federal Campaign Finance Act That This Court Upheld Against Similar Constitutional Attack.

The Washington Supreme Court majority's decision cannot be sustained given this Court's long history of upholding, against First Amendment attack, campaign finance statutes that place greater restrictions than does § 760 on a union's ability to use members and nonmembers' monies for partisan politics.

The time and expense required to comply with § 760 are dwarfed by the onerous burdens that the FECA imposes upon unions' political speech. FECA prohibits unions from using their general funds for political contributions and expenditures and requires political expenditures to be made from a separate segregated fund (or political action committee ("PAC")) "fund[ed] by voluntary contributions." *Austin*, 494 U.S. at 671 (Brennan, J., concurring).

These political funds are governed by complex regulations and necessitate significant start-up costs. Indeed, the FEC's "Campaign Guide for Corporations and Labor Unions,"[27] spans nearly 100 pages, and the federal regulations governing PACs are equally extensive. *See* 11 C.F.R. Part 102. Moreover, in addition to requiring *members* to opt in to make political contributions to union PACs, FECA imposes a blanket prohibition on union PACs soliciting funds from nonmembers. 2 U.S.C. § 441b(b)(4)(A)(ii).

---

[27] *Available at* http://www.fec.gov/pdf/colagui.pdf (last visited Nov. 7, 2006).

Notwithstanding FECA's significant restrictions on political speech, this Court is "unanimous" that, despite the federal opt-in requirement, unions and corporations have been provided a "constitutionally sufficient" opportunity to engage in political speech, "express advocacy" and "electioneering communication."[28] These limits on labor unions have been upheld against First Amendment attack[29] because the potential for disproportionate political influence by corporations and labor unions justifies the regulation. *See Austin*, 494 U.S. at 660-61.

Only a complete ban on political expression, not its mere regulation, raises serious First Amendment concerns. *McConnell v. FEC*, 540 U.S. 93, 204 (2003). Section 760 does not prevent unions from engaging in political speech, even with nonmembers' compelled fees, provided the nonmembers merely authorize that use. Unlike the federal law, § 760 permits unions to use general treasury funds to make political contributions and expenditures. Unions are even allowed to use members' dues without their affirmative consent, in contrast to the federal law.

In fact, unions have no constitutional right to spend their general treasury funds to influence elections. This Court has upheld the longstanding federal ban on union and corporate use of treasury funds to influence elections–finding that the separate segregated fund opt-in provision sufficiently protects a union's constitutional rights. *See id.* 540 U.S. at 203-09

---

[28] *McConnell v. FEC*, 540 U.S. 93, 203 (2003); *see also FEC v. Nat'l Right to Work Comm. ("NRTWC")*, 459 U.S. 197, 207 (1982) (holding that FECA's prohibition against solicitation does not violate the First Amendment right to associate because that right is "overborne by the interests Congress . . . sought to protect in enacting § 441b").

[29] *See also FEC v. Beaumont*, 539 U.S. 146 (2003); *NRTWC*, 459 U.S. at 198-200; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

(detailing and approving Congress' history of regulating labor union political activities since 1907).

The federal PAC opt-in provision allows corporate and union political participation "'without the temptation to use corporate [or union] funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, . . . without jeopardizing the associational rights of advocacy organizations' members.'" *Id.* at 204 (quoting *Beaumont*, 539 U.S. 146, 163 (2003)) (citations omitted); *accord Pipefitters*, 407 U.S. at 402. It also furthers the important governmental interest of protecting "the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed."[30]

In the federal system, the statutory protection of individual union members who might oppose the union leadership's political contributions is secured by prohibiting union treasury expenditures on federal elections and requiring voluntary opt-in contributions from union members for political activities, *see Pipefitters*, 407 U.S. at 402-13, not by the opt-out procedure the majority required here. As this Court noted: "The dominant concern in requiring that contributions be voluntary was, after all, to protect the dissenting . . . union member." *Id.* at 414-15. Here, the State of Washington has not even gone that far. The State has only protected nonmembers by requiring that their contributions be voluntary.

Under current federal law, union political contributions can only be made from a union PAC. Union member

---

[30] *NRTWC*, 459 U.S. at 208; *accord United States v. CIO*, 335 U.S. 106, 113 (1948); *see also Austin*, 494 U.S. at 673-78 (Brennan, J., concurring); *Id.* at 659-60; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 258-60 (1986).

contributions to the PAC must be voluntary, knowing, and intentionally given, and the union and its PAC may not solicit nonmembers.[31] The Federal Election Commission has specifically determined that an opt-out system violates the Act. 11 C.F.R. § 114.5(a)(1); *see also* 2 U.S.C. §§ 441b(a), 441b(b)(3)(A).

This Court has recognized that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Austin*, 494 U.S. at 660. That applies equally to union wealth, because it too is accumulated with the state's help. The state certifies a union as employees' exclusive bargaining representative with the power to compel financial support from members and nonmembers alike.

Under any standard used to judge campaign finance laws, Washington State, like the federal government in the FECA, has a compelling interest, not just a rational interest, to require

---

[31] 2 U.S.C. §§ 441b(a), 441b(b)(3), 441b(b)(4)(A)(ii); 11 C.F.R. §§ 114.5(a), 114.5(g)(2); *see also United States v. Boyle*, 482 F.2d 755, 763-64 (D.C. Cir. 1973); *NEA*, 457 F. Supp. at 1108-09. Many states have similar campaign finance laws that restrict union political solicitations and contributions. *See* Alaska Stat. §§ 15.13.074(f), 15.13.135 (2006); Ariz. Rev. Stat. Ann. §§ 16-919(B), 16-920, 16-921 (West 2006); Colo. Const. Art. XXVIII, §§ 3(4) & 6(2); Ind. Code Ann. §§ 3-9-2-4, 3-9-2-5(b) (West 2006); Iowa Code Ann. § 20.26 (West 2006); Md. Code Ann., Elec. Law §§ 13-242, 13-243 (2006); Mich. Comp. Laws Ann. §§ 169.254, 169.255 (West 2006); Neb. Rev. Stat. Ann. §§ 49-1469, 49-1469.06 (2006); N.C. Gen. Stat. Ann. § 163-278.19(a) & (b) (2006); N.D. Cent. Code §§ 16.1-08.1-01(1), 16.1-08.1-03.3 (2006); Ohio Rev. Code Ann. §§ 3517.082, 3599.03 (West 2006); Pa. Cons. Stat. Ann. § 1101.1701 (West 2006); S.D. Codified Laws Ann. §§ 12-25-1(1), 12-25-2 (2006); Tex. Elec. Code Ann. §§ 253.094, 253.100 (Vernon 2006); Utah Code Ann. §§ 20A-11-1403, 20A-11-1404 (2006); Wis. Stat. Ann. § 11.29 (West 2006); Wyo. Stat. Ann. § 22-25-102 (2006). Some states require written authorization of political deductions. Ohio Rev. Code Ann. § 3599.031(A) (West 2006); Wyo. Stat. Ann. § 22-25-102(h) (2006).

that political contributions by nonmembers be knowing and voluntary. This Court in *Pipefitters*, 407 U.S. at 439, interpreted a federal statute concerning solicitation of political contributions from union members to require "knowing free-choice donations." "'Knowing free-choice' means an act intentionally taken [opt in] and not the result of inaction when confronted with an obstacle [opt out]." *NEA*, 457 F. Supp. at 1109.

In light of this Court's campaign finance decisions, the modest restrictions § 760 imposes, which serve the compelling governmental interest of protecting nonmembers from being compelled to fund political speech with which they disagree, fall well within the First Amendment's bounds. *See Miller*, 103 F.3d at 1240 (rejecting a First Amendment challenge to a statute that required unions to obtain annually the affirmative consent of political contributors).

If the administrative burdens associated with establishing a PAC and soliciting voluntary contributions from members do not impermissibly burden a union's First Amendment right to engage in political speech, then the much less onerous opt-in requirement of § 760, which could be satisfied by requesting consent in the *Hudson* notice the union already sends nonmembers, is certainly constitutional. For these reasons alone, the Washington Supreme Court's decision must be reversed and § 760 permitted to protect the political process in the State of Washington.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court reverse the judgment below on both Questions Presented, rule that union officials do not have a First Amendment right to take and use for politics the wages of nonmembers, rule that § 760 and its requirement that unions obtain the nonmember's affirmative authorization to use his or her compelled fees for politics does not violate the First Amendment rights of labor unions, and remand this case back to the lower courts for further proceedings consistent with its ruling.

Respectfully submitted,

MILTON L. CHAPPELL
Counsel of Record for Petitioners
GLENN M. TAUBMAN
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

ELLIS, LI & McKINSTRY PLLC
By Steven T. O'Ban
Two Union Square
601 Union Street, Suite 4900
Seattle, WA 98101-3906
(206) 682-0565

COUNSEL FOR PETITIONERS

November 9, 2006

B

No. 05-1589, 05-1657

IN THE

Supreme Court of the United States

GARY DAVENPORT, *et al.*,
Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

On Writs of Certiorari to the Supreme Court of Washington

BRIEF FOR RESPONDENT

JUDITH A. LONNQUIST
1218 Third Avenue, Suite 1500
Seattle, WA 98101
(206) 622-2086

HARRIET STRASBERG
3136 Maringo Road SE
Olympia, WA 98501
(360) 754-0304

JOHN M. WEST
(Counsel of Record)
JEREMIAH A. COLLINS
LAURENCE S. GOLD
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

80

QUESTION PRESENTED

Whether the restriction imposed by Wash. Rev. Code § 42.17.760 on respondent Washington Education Association's First Amendment right to use funds lawfully in its possession for political speech is justified by a compelling governmental interest either in protecting the public interest in the integrity of the electoral process or in providing additional protection for the First Amendment rights of individual union nonmembers who pay agency fees.

CORPORATE DISCLOSURE STATEMENT

Respondent Washington Education Association is organized as a nonprofit corporation. It has no parent corporation, and no publicly held company owns any stock in it.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vi
STATEMENT	1
A. Factual Background	1
B. The Statute	5
C. Proceedings Below	8
SUMMARY OF ARGUMENT	15
ARGUMENT	19
I. AS A RESTRICTION ON WEA'S POLITICAL EXPRESSION FINANCED BY FUNDS LAWFULLY IN ITS TREASURY, SECTION 760 IS SUBJECT TO STRICT SCRUTINY	21
II. SECTION 760 IS NOT NARROWLY TAILORED TO ADVANCE A COMPELLING GOVERNMENTAL INTEREST	27
A. SECTION 760 IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENTAL INTEREST IN THE INTEGRITY OF THE ELECTORAL PROCESS	27
1. The State Lacks A Compelling Interest That Justifies Restricting Union Contributions And Expenditures On Ballot Propositions	28

TABLE OF CONTENTS—Continued

Page

2. The Statute's Underinclusiveness Demonstrates That Section 760 Is Not Narrowly Tailored To Further Any Compelling Interest In Ensuring That An Organization's Electoral Contributions And Expenditures Represent The Views Of Those Who Provide The Funds 32

B. THE STATUTE WAS NOT INTENDED TO PROTECT THE FIRST AMENDMENT RIGHTS OF INDIVIDUAL AGENCY FEE PAYERS NOR DOES IT DO SO 35

1. As The Washington Supreme Court Held, The Purpose Of The Statute Was Not To Enhance The Rights Of Individual Employees But To Protect The Public's Interest In The Integrity Of Elections 36

2. No WEA Agency Fee Payer Is Forced To Support Political Causes With Which He Or She Disagrees, And There Is No Compelling Interest In Protecting Nonmembers Against Being "Too Busy" Or "Forgetting" To Assert Their Right Not To Provide Such Support 40

TABLE OF CONTENTS—Continued

	Page
III. HOLDING SECTION 760 UNCONSTITUTIONAL DOES NOT CALL INTO QUESTION ANY OTHER STATE OR FEDERAL AGENCY SHOP OR CAMPAIGN FINANCE REGULATION	46
CONCLUSION	50
APPENDIX	1a

TABLE OF AUTHORITIES

CASES Page

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).....3, 4, 18, 40, 41
Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998)..... 42
Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)..... 39
Buckley v. Valeo, 424 U.S. 1 (1976)..... 29, 30
Burson v. Freeman, 504 U.S. 191 (1992)..... 22
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).....4, 41, 42
Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 30, 31
City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 35
City of Houston v. Hill, 482 U.S. 451 (1987)..... 32
City of Ladue v. Gilleo, 512 U.S. 43 (1994)..... 35
Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980)..... 22, 50
FEC v. Beaumont, 539 U.S. 146 (2003).....23, 24, 29, 31
FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ..... *passim*
FEC v. National Conservative PAC, 470 U.S. 480 (1985)..... 30
FEC v. National Right to Work Comm., 459 U.S. 197 (1982).....25, 29, 30
First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).... *passim*
Florida Star v. B.J.F., 491 U.S. 524 (1989)..... 35, 40
International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992)..... 50
Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005)..... 44

TABLE OF AUTHORITIES—Continued

	Page
Johnson v. Fankell, 520 U.S. 911 (1997)	21
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991)	4, 41
Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949)	46
McConnell v. FEC, 540 U.S. 93 (2003)	23, 32
Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)	39
Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000)	29
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)	50
Regan v. Taxation With Representation, 461 U.S. 540 (1983)	49
Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746 (1963)	49
Romer v. Evans, 517 U.S. 620 (1996)	37
Rust v. Sullivan, 500 U.S. 173 (1991)	49
Shaw v. Hunt, 517 U.S. 899 (1996)	39
State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n, 999 P.2d 602 (Wash. 2000)	5, 8
State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n, 49 P.3d 894 (Wash. Ct. App. 2002)	8
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)	37
United States v. Congress of Indus. Orgs., 335 U.S. 106 (1948)	28
United States v. Virginia, 518 U.S. 515 (1996)	39
Virginia v. Hicks, 539 U.S. 113 (2003)	32

TABLE OF AUTHORITIES—Continued

	Page
Washington Fed'n of State Employees v. State, 901 P.2d 1028 (Wash. 1995)	37
West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)	44
Wooley v. Maynard, 430 U.S. 705 (1977)	44
STATUTES	
2 U.S.C. § 441b(a)	31, 50
2 U.S.C. § 441b(b)(2)(A)	28, 50
2 U.S.C. § 441b(b)(2)(C)	28, 50
29 U.S.C. § 164(b)	49
42 U.S.C. § 1983	42
5 Ill. Comp. Stat. 315/3(g)	47
Md. Code Ann., Educ. § 6-504(d)(3)(iv)(l)	47
Mich. Comp. Laws § 169.254(3)	31
Minn. Stat. § 179A.06(3)	47
Mont. Code Ann. § 39-31-402(3)	31
N.J. Stat. Ann. § 34:13A-5.5(b)	47
N.M. Stat. Ann. § 10-7E-4(J)	47
Pa. Stat. Ann. tit. 25, § 3253(a)	31
Pa. Stat. Ann. tit. 43, § 1101.1701	31
Pa. Stat. Ann. tit. 43, § 1102.2	47
R.I. Gen. Laws § 17-25-10.1(j)	31
2006 R.I. Pub. Laws 292, § 1	31
S.D. Codified Laws § 12-25-2	31
Vt. Stat. Ann. tit. 3, § 902(19)	47
Wash. Rev. Code §§ 28B.52.010 *et seq.*	1
Wash. Rev. Code § 28B.52.045	3
Wash. Rev. Code §§ 41.56.010 *et seq.*	1
Wash. Rev. Code § 41.56.080	3
Wash. Rev. Code § 41.56.122	3
Wash. Rev. Code §§ 41.59.010 *et seq.*	1
Wash. Rev. Code § 41.59.060(2)	3

TABLE OF AUTHORITIES—Continued

	Page
Wash. Rev. Code § 41.59.090	3
Wash. Rev. Code § 41.59.100	3, 13, 48
Wash. Rev. Code §§ 41.76.001 *et seq.*	1
Wash. Rev. Code § 41.76.015	3
Wash. Rev. Code § 41.76.045	3
Wash. Rev. Code § 42.17.020(17)	7
Wash. Rev. Code § 42.17.020(22)	12
Wash. Rev. Code § 42.17.020(38)	7
Wash. Rev. Code §§ 42.17.350-471	7
Wash. Rev. Code § 42.17.360	37
Wash. Rev. Code § 42.17.610	6, 37
Wash. Rev. Code § 42.17.620	6, 37
Wash. Rev. Code § 42.17.640	6
Wash. Rev. Code § 42.17.680(3)	8
Wash. Rev. Code § 42.17.680(3) (1993)	6
Wash. Rev. Code § 42.17.760	*passim*
2002 Wash. Laws ch. 156, § 1	6
Wyo. Stat. Ann. § 22-25-102(a)	31

STATEMENT

A. *Factual Background*

1. Respondent Washington Education Association ("WEA") is a labor organization whose 370 local affiliates act as the exclusive bargaining representatives for over 70,000 teachers and other education employees of public school districts, community colleges, and universities in the State of Washington under Washington's Educational Employment Relations Act, Wash. Rev. Code §§ 41.59.010 *et seq.*, and other statutes governing public-sector employment relations.[1] Joint Appendix ("J.A.") 77, 83.

Like most unions, WEA works to advance the interests of the employees it represents through a variety of forms of concerted activity. First and foremost, WEA assists its local affiliates in negotiating and enforcing collective bargaining agreements governing terms and conditions of employment. But because decisions made by the legislature and through ballot initiatives and local tax levies determine educational policy and funding and thus have a direct impact on the conditions of teachers' employment, WEA believes it essential to its ability effectively to advance the interests of the education employees it represents to engage in various forms of political advocacy as well. J.A. 140-43. During the years at issue in this litigation, WEA's election-related spending from its general treasury fund that was required to be reported to the state Public Disclosure Commission (not including internal communications) varied between less than 1% and

---

[1] While the vast majority of the employees WEA represents are certificated employees covered by the Educational Employment Relations Act, WEA also represents some classified employees who are subject to the Public Employees' Collective Bargaining Act, Wash. Rev. Code §§ 41.56.010 *et seq.*, as well as community college and university faculty members, whose labor relations are governed respectively by Wash. Rev. Code §§ 28B.52.010 *et seq.* and §§ 41.76.001 *et seq.*

just over 3% of WEA's total expenditures in those years. J.A. 175-76, 192-93; Report of Proceedings ("R.P.") 760-65.

With the exception of in-kind contributions to cover the administrative expenses of WEA's separate political action committee, all of WEA's reportable political contributions and expenditures were made in support of or in opposition to various ballot propositions submitted to the electorate at the state and local levels. Although Washington law permits corporations and labor organizations to make contributions and expenditures in support of candidates for political office from their general treasury funds, WEA in fact made no such treasury fund contributions or independent expenditures in connection with candidate elections. J.A. 126, 154-55. Instead, WEA maintained a separate political action committee, WEA-PAC, funded by voluntary contributions of WEA members over and above their dues payments, which made contributions and expenditures in support of political candidates. J.A. 154-55. (WEA-PAC contributions and expenditures are not at issue in this litigation.)

Of WEA's political contributions and expenditures with respect to ballot propositions, a portion—consisting largely of in-kind contributions—went to committees supporting local tax levies submitted to the voters in various school districts. Pl. Trial Ex. 6, 12, 16; R.P. 282, 293, 299. The rest were contributions to political committees supporting or opposing statewide ballot measures, notably four initiatives submitted to the electorate at the 1996 and 2000 general elections: In 1996, WEA opposed Initiatives 173 and 177, relating to school vouchers and charter schools, because of the negative impact it believed those initiatives would have had on public education funding and employment, J.A. 144-46, while four years later it supported both Initiative 728 to reduce class size in the public schools and Initiative 732 to provide cost-of-living adjustments for education employees. J.A. 125-26, 146-48; R.P. 303-05.

2. Of the education employees WEA represents, just over 95% have chosen to join WEA as union members and accordingly pay union dues into WEA's general fund from which the union finances its activities. The remainder of the WEA-represented employees, fewer than 5%, have chosen not to become union members. Def. Trial Ex. 57-61; R.P. 180.

Washington law requires that a public-sector union must represent, on an equal basis, all employees in the bargaining units for which it is certified as exclusive bargaining representative, "without regard to [the employee's] membership in that bargaining representative." Wash. Rev. Code § 41.59.090; *see also id.*, §§ 41.56.080, 41.76.015. To spread the financial burden of this required equal representation of union members and nonmembers, Washington—like most of the states that provide for public-sector collective bargaining, and like federal law with respect to private-sector employment—permits public-sector unions to negotiate collective bargaining agreements that require payment of an "agency fee" to the union by the employee-nonmembers the union is required to represent. Wash. Rev. Code § 41.59.100; *see also id.*, §§ 28B.52.045, 41.56.122, 41.76.045. Washington law sets the agency fee to be collected pursuant to such a provision at an amount "equal to the fees and dues required of membership in the [union]." Wash. Rev. Code § 41.59.060(2); *see also id.*, § 41.59.100.

This Court has long recognized the important public purposes served by an agency fee system and the permissibility of that system under the First Amendment. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220-22 (1977). At the same time, in deference to the employee-nonmembers' First Amendment nonassociational rights, the Court has ruled that nonmembers who object to paying for a union's political and ideological activities can only be required to pay a reduced agency fee that is equal to the portion of union dues that is expended for purposes germane to collective bargaining. *See*

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991). In addition, the Court has held that unions that have negotiated an agency fee provision must give nonmembers notice of the amount and nature of the union's germane and non-germane expenditures and the opportunity to object to paying the portion of the agency fee that corresponds to the latter. *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Consistent with these constitutional requirements, WEA annually provides each employee-nonmember subject to an agency fee requirement with a "*Hudson* notice" explaining the union's breakdown of its germane and non-germane expenditures for the relevant fiscal year and offering, to any nonmember who informs the union of his or her objection, a rebate of that portion of the fee that represents the nonmember's *pro rata* share of the union's non-germane expenditures. J.A. 194-207. In accordance with this Court's teaching, *see Abood*, 431 U.S. at 241, the nonmember wishing to object need only send to WEA headquarters a "general statement of objection," J.A. 198; no further justification or explanation of the nature of the objection is required.

Typically, about three-quarters of WEA's total expenditures are deemed chargeable to objecting nonmembers, while the remaining 25%—including not only the election-related expenses at issue here, but also WEA's expenditures for purposes such as lobbying, public relations, organizing, donations, and member-only benefits—is treated as nonchargeable to objectors. J.A. 203-07; R.P. 339. Thus, for example, the *Hudson* notice for the 2000-01 fiscal year informed nonmembers that 75.7% of WEA's expenditures were germane to collective bargaining, J.A. 201, and accordingly any nonmember who objected to paying the portion of the agency fee corresponding to WEA's political and other non-

germane expenditures was entitled, upon request, to a 24.3% reduction in the fee.[2]

Payroll deductions received by WEA from employers, consisting of the union dues of members and the agency fees of nonmembers, are deposited in WEA's general fund, from which WEA makes all of its disbursements, including the political expenditures that are at issue in this litigation. J.A. 101; R.P. 127, 130-31.[3] During the years 1996-2000, dues paid by WEA members made up approximately 84.5% of WEA's total revenues that went into the general fund, while just under 4.3% of those total revenues came from nonmembers' agency fees, with the remainder attributable to interest and other miscellaneous income. J.A. 192-93; R.P. 760-61.

B. *The Statute*

In 1992 Washington voters adopted through Initiative 134 a Fair Campaign Practices Act ("Act"), which amended and added new provisions concerning campaign contribution limitations to Washington's campaign finance and lobbying disclosure law in Title 42, Chapter 17 of the Washington Revised Code. The initiative was sponsored by "senators from one political party" following the defeat of a similar bill during the 1991 legislative session. *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 999 P.2d 602, 605 (Wash. 2000).

The text of the Act recites "findings" concerning rapidly increasing campaign costs and the disproportionate influence

---

[2] In addition, any fee payer who so requests is entitled to a review by an independent arbitrator of the union's calculation of the percentage of its expenditures that is chargeable to objectors. J.A. 197.

[3] Any agency fees received from employers before nonmembers have had the opportunity to object and request refunds are held in escrow until, following the nonmember's objection, the nonchargeable portion is refunded, with interest, to the objector and the chargeable portion is transferred to WEA's general account. J.A. 95-99; R.P. 147-48.

of financially affluent entities on the election of candidates, with the attendant perceptions of undue influence of large contributors on public officials. Wash. Rev. Code § 42.17.610. The Act then declares its "intent":

> By limiting campaign contributions, the people intend to:
>
> (1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;
>
> (2) Reduce the influence of large organizational contributors; and
>
> (3) Restore public trust in governmental institutions and the electoral process.

Id., § 42.17.620.

Unlike federal law and that of some states, the Act does not prohibit corporations or labor organizations from making political contributions from their general treasury funds, but instead establishes dollar limits on contributions to candidates for public office, which apply alike to corporations, labor organizations, and individuals. Wash. Rev. Code § 42.17.640. Two provisions of the Act, however, specifically target union political activities. One of them, Section 680(3), instituted a requirement of annual written authorization for payroll deductions made to political committees or otherwise designated for political contributions, Wash. Rev. Code § 42.17.680(3) (1993) (subsequently replaced by an annual notification requirement, *see* 2002 Wash. Laws ch. 156, § 1).

The other provision is the one at issue in this litigation. Section 760 of the Act applies solely to labor organizations, and it is the only portion of Initiative 134—or indeed of Chapter 42.17 of the Washington Revised Code—that even mentions agency fees:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to

> influence an election or to operate a political committee, unless affirmatively authorized by the individual.

Wash. Rev. Code § 42.17.760. On its face, Section 760 applies to all unions within the state, including those in the private sector.

Section 760's restriction on union political contributions and expenditures is not confined to contributions to political candidates and expenditures relating to elections for public office. Rather, the statutory definitions make clear that Section 760 also restricts the ability of labor organizations to make contributions and expenditures relating to ballot initiatives and referenda. Thus, "election" is defined to include any "election for public office and any election in which *a ballot proposition is submitted to the voters*," Wash. Rev. Code § 42.17.020(17) (emphasis added), while a "political committee" is an entity making expenditures "in support of, or opposition to, any candidate *or any ballot proposition*." Wash Rev. Code § 42.17.020(38) (emphasis added). Section 760 is the only provision of Washington law that prohibits the use of funds for contributions or expenditures relating to ballot propositions.

Washington law establishes an administrative agency, the Public Disclosure Commission ("PDC"), that is charged with the administration and enforcement the campaign finance and lobbying disclosure provisions of Title 42, Chapter 17, including the Fair Campaign Practices Act and Section 760. *See* Wash. Rev. Code §§ 42.17.350-471. Prior to this litigation, the PDC had never sought to enforce Section 760, nor had that section been the subject of any judicial interpretation, agency rulemaking, or other guidance from the PDC. *See* Appendix to Petition for Certiorari in No. 05-1657 ("Pet. App.") 9a. Indeed, the PDC had specifically declined union requests that it provide guidance on how to comply with Section 760. *Id.*; R.P. 650-62.

C. *Proceedings Below*

1. The lawsuit brought by the State's Attorney General on behalf of the PDC, which is the subject of No. 05-1657, was initiated in October 2000 in response to a complaint filed with the Attorney General by the Evergreen Freedom Foundation ("Evergreen"), an advocacy organization that has repeatedly pursued charges and litigation against WEA under the Fair Campaign Practices Act. J.A. 158-59. Evergreen's complaint alleged that WEA, from "general dues and the fees of non-members," was making contributions to its political action committee and to "ballot-issue political committees." Def. Trial Ex. 162; R.P. 570.[4]

---

[4] Evergreen's attempt in its *amicus* brief to portray WEA as a scofflaw with respect to the Act, Evergreen Br. at 9-10, indicates less about WEA's willingness to comply with the law than it does about Evergreen's efforts to press the Act into the service of its own political agenda through vexatious litigation. *See State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 49 P.3d 894 (Wash. Ct. App. 2002) (rejecting Evergreen's contention that WEA constituted a "political committee" within the meaning of the Act); *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 999 P.2d 602 (Wash. 2000) (rejecting Evergreen's contention that the Wash. Rev. Code § 42.17.680(3) requirement of annual written authorization for payroll deductions for political purposes applied to deductions for union dues). Those of Evergreen's charges against WEA that the PDC elected to prosecute were resolved by a 1998 settlement agreement in which the PDC acknowledged that most of the violations of the Act had been unintentional and had resulted from misunderstanding of the Act's reporting requirements. *See* Def. Trial Ex. 93, R.P. 484-89.

Ironically, the instant lawsuit resulted from WEA's attempt to comply with the 1998 settlement agreement. Prior to November 1996, WEA made the kinds of political expenditures that form the basis for the State's prosecution of this lawsuit from a separate Community Outreach Program account ("COP"), which was funded by a membership dues supplement that nonmembers did not pay. After the PDC took the position that this designation of COP funds for political purposes made COP a "political committee" subject to the restrictions of Wash. Rev. Code § 42.17.680(3), WEA changed its practice, in order to avoid the problem identified by the

After Evergreen's complaint was forwarded to the PDC for investigation, WEA stipulated that it had "deposited into its general fund agency fee money" and that this "general fund money was used to make contributions and expenditures to influence an election and to operate a political committee." J.A. 80.[5] Finding, on that basis, "apparent multiple violations of RCW 42.17.760 by the Respondent WEA," the PDC referred the case to the Attorney General for prosecution. Pet. App. 119a-120a. The complaint subsequently filed by the Attorney General in Thurston County Superior Court alleged violations of Section 760 between 1996 and 2000 based on the fact that "the WEA has expended funds from its general treasury for political contributions described in RCW 42.17.760." J.A. 78.

Following discovery, WEA moved for summary judgment and the State moved for partial summary judgment. Granting the State's motion, the trial court held (i) that Section 760 was constitutional; and (ii) that an agency fee payer's failure, in response to WEA's "*Hudson* notice," to file an objection and request a reduction in his or her agency fee corresponding to WEA's non-germane expenditures did not constitute "affirmative authorization" within the meaning of the statute. Pet. App. 117a. The trial court determined, however, that there

---

PDC, by making such political expenditures instead from general treasury funds. *See* Def. Trial Ex. 93. In the 1998 settlement agreement the PDC expressly "acknowledge[d] and agree[d] that WEA legally may use its general treasury funds for these activities . . . ." *Id.* at 8, ¶ 4. After having specifically declined requests that it provide guidance to unions on how to comply with Section 760, and on that provision's interface with Section 42.17.680(3), *see* Pet. App. 9a; R.P. 650-62, the PDC brought the instant lawsuit against WEA based on the use of general treasury funds for political advocacy that the PDC had specifically approved in the 1998 settlement.

[5] The stipulation, which the trial court determined was applicable only to the 1999-2000 fiscal year, R.P. 20-22 (3/23/01 hrg.), also acknowledged that, by doing so, "Respondent committed multiple violations of RCW 42.17.760." J.A. 81.

were issues of fact as to whether, by making political expenditures and contributions from its general fund, WEA "ha[d], in fact, used agency fe[e]s to influence an election or to support a political committee," *id.*, and the court accordingly conducted a five-day bench trial on that question.

Two of the three accountants to testify at trial, including an independent expert retained by both parties, opined that, under the circumstances at issue in this case, the mere commingling of agency fees in WEA's general fund was an insufficient basis for concluding that WEA had "used" such fees for the political purposes identified by Section 760. J.A. 161-63, 175-78, 192-93; R.P. 760-61. Testifying for the State, on the other hand, accountant Jeffrey Baliban opined on direct examination that "to whatever extent political expenditures are made out of [a] commingled account, a proportionate amount of fee payer money is used" for that purpose. J.A. 131. Baliban explained the theory upon which the State prosecuted the case as follows:

> Q. Now, . . . assume you have a fund where there are commingled funds . . . of dues and fees and other revenues, and the organization . . . wants to use some of that money for political expenditures, it's your view that the only way they can do that because of your proportionality premise is by having affirmative authorizations, correct?
>
> . . .
>
> A. Every single fee payer that contributed to that fund has to give you affirmative authorization.

J.A. 132-34.

Adopting that theory, the trial court held that "when agency fees were commingled with other funds in the general treasury, expenditure of *any general treasury monies* to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes." Pet. App. 99a (emphasis added). The court elab-

orated: "[A]gency fees were placed into the general fund and were spent each year as the WEA determined appropriate. . . . This is a clear-cut *use* of the total funds available for the given purposes in proportion to the source of the funds." *Id.* at 106a-107a (emphasis in original). Doing this without all fee payers' affirmative authorization, the court held, violated Section 760. *Id.* at 107a.

Although the court and the parties did not find it necessary to develop a comprehensive list of the election-related contributions and expenditures made by WEA from its general treasury that resulted in the finding of a Section 760 violation, the *only* evidence in the record of such contributions and expenditures is with respect to spending on ballot propositions, as well as expenses related to internal election-related communications with WEA's members and in-kind contributions covering the administrative costs of WEA's political action committee. J.A. 125-26, 144-51; Pl. Trial Ex. 2, 6, 7, 11, 12, 14, 16, 19; R.P. 276-305. In contrast, the record evidence shows that WEA did *not* make contributions or independent expenditures related to the election of candidates for public office. J.A. 126, 154-55.

Having found a violation of the statute based on the foregoing expenditures and contributions, the court assessed a civil penalty of $200,000, Pet. App. 109a, doubled that amount to $400,000 as a "punitive sanction" upon its finding that the violation was intentional, *id.* at 111a-112a, and awarded the State its costs and attorney's fees, *id.* at 112a, for a total penalty of $590,375. *Id.* at 6a.

The court also entered a permanent injunction, J.A. 208-17, requiring WEA in future years to reduce the agency fee paid by nonmembers by "the percentage of the WEA's total expenditures that are analyzed to have been used for § 760 expenses in the second fiscal year prior" plus a "cushion" of 3 percent. J.A. 212. The injunction defined Section 760 expenses to include "all political advertising expenditures, as

well as direct and in-kind contributions, internal political communications, and independent expenditures." J.A. 209.[6] In order to permit calculation of the required reduction in the agency fee, the injunction mandated extensive record-keeping, including notably that the organization "[r]ecord expenses and salaries associated with internal communications to enable identification and quantification of all expenses of any internal communications to support or oppose[] ballot propositions or candidates or [that] otherwise are made to operate a political committee or influence an election." J.A. 210.

2. In the meantime, five agency fee payers, petitioners in No. 05-1589, brought a class action lawsuit against WEA in the same court, asserting an implied private right of action under Section 760 as well as various tort theories—all predicated on the alleged violation of Section 760—and seeking to recover portions of the agency fees they had paid. J.A. 3-12. The trial judge dismissed one of the tort claims, allowed the others to go forward, certified a class as to certain claims, and stayed further proceedings while certifying his ruling for interlocutory appeal. Davenport Pet. App. 45a-49a.

3. The two cases were heard together on appeal. Reversing the trial court, the court of appeals reached only the issue of the statute's constitutionality. Relying on this Court's agency fee jurisprudence, it struck down Section 760 as unconstitutional. Pet. App. 48a; *see also* Davenport Pet. App. 42a.

Judge Hunt dissented from the majority's view that the statute was unconstitutional, Pet. App. 70a-77a, but in so doing she agreed that WEA had had a good faith basis for its

---

[6] Whether Section 760 applied to a union's internal political communications with its members was disputed at trial. The court's permanent injunction adopted the position advocated by the State, according to which the statutory definition of "expenditure" to include any "payment," Wash. Rev. Code § 42.17.020(22), encompassed payments that WEA made in communicating with its members with respect to elections. *See* J.A. 87-90.

belief that it had complied with the statute, and she therefore concurred with the majority in holding that all penalties against WEA should be vacated. *Id.* at 78a. In the Davenport case, Judge Hunt concurred in the result, agreeing that the trial court's ruling should be reversed, but on the basis of an intervening appellate decision holding "that '42.17 RCW does not imply a private cause of action.'" Davenport Pet. App. 43a-44a.

4. The Washington Supreme Court granted discretionary review and affirmed the judgment of the court of appeals. Pet. App. 1a. The court addressed two issues. It first held that, although the statutory requirement of "affirmative authorization" did not mean *written* authorization, and although "the State was unable to specify what form of authorization would satisfy the requirement of affirmative authorization," *id.* at 11a, a nonmember's "[f]ailure to respond to the *Hudson* packet . . . would not fulfill the affirmative authorization requirement." *Id.* at 10a.

The Washington court therefore turned to the question whether the statute, so construed, was constitutional. Answering that question in the negative, the court held that the affirmative authorization requirement of Section 760 unconstitutionally burdened the right of WEA and its members to engage in political speech.

Citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the court rejected as "disingenuous" the State's contention "that § 760 has no impact on the First Amendment rights of [union] members" and their "ability to assert their collective political voice." Pet. App. 19a. Here, the court explained, Washington law allows WEA "to collect a fee equivalent to 100 percent of union dues," *id.* at 30a (citing Wash. Rev. Code § 41.59.100), but "RCW 42.17.760 then encumbers the use of such funds by prohibiting their expenditure for political speech absent affirmative authorization by the agency fee paying nonmember." *Id.* Thus, "the

statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech." *Id.* at 30a-31a (emphasis in original). Such "a restriction on the First Amendment rights of WEA must be justified by a *compelling* governmental interest." *Id.* at 26a (emphasis in original).

In this case, the court noted, "the only interest asserted" as justifying this restriction was "additional protection for nonmembers' First Amendment rights." *Id.* The Washington court found multiple reasons for rejecting that asserted interest as justification for the statutory restriction. In the first place the court held that protection of individual agency fee payers' First Amendment rights against compelled speech simply was *not* the purpose of the statute: "[T]he principal thrust of I-134 was to protect the integrity of the election process .... Thus, the intent of the statute is to protect the public, not individual employees." *Id.* at 12a; *see also id.* at 22a-23a ("[T]here is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles.").

Even if providing additional protection for nonmembers' First Amendment rights had been the statutory purpose, the court below found "no indication or argument that WEA is compelling nonmembers to support political activities or preventing nonmembers from asserting their First Amendment rights." *Id.* at 26a. The court found it evident that, "[a]s the Supreme Court has held, there is no compelled support if the union utilizes the *Hudson* procedures." *Id.* In other words, "[a]n employee who is given a simple and convenient method of registering dissent has not been compelled to support a political cause and has not suffered a violation of his or her First Amendment rights." *Id.* at 17a. Thus, "[g]iven that there is no compelled support [of political causes], it does not appear that there is any governmental interference with First Amendment rights of nonmembers for § 760 to protect against." *Id.* at 26a. And, in the alternative,

the restriction on unions' political expression was not narrowly tailored to protect the alleged interest: "The constitutionally acceptable opt-out alternative is significant in that it reveals that protection of dissenters' rights can be achieved through means significantly less restrictive . . . than RCW 42.17.760's opt-in requirement." *Id.* at 33a. Accordingly, the Washington Supreme Court struck down Section 760 as unconstitutional.

SUMMARY OF ARGUMENT

The restriction imposed by Section 760 on WEA's use of funds lawfully in its possession for political advocacy—notably to support or oppose ballot propositions presented to the Washington electorate—is not narrowly tailored to further any compelling governmental interest.

1. Section 760, as authoritatively construed by the Washington Supreme Court, encumbers the use of funds that are properly within the union's possession pursuant to other provisions of Washington law, by requiring that the union obtain individual authorization from nonmember fee payers if it wishes to spend its funds for purposes of political speech on election-related matters. This restriction on political speech must be judged under the standard of strict scrutiny. Section 760 is a content-based restriction that singles out political speech for special treatment, and its restrictions burden the exercise of political speech in the same way as did the restrictions on corporate expenditures to which the Court applied strict scrutiny in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*").

The arguments of petitioners and their *amici* for less searching scrutiny are precluded by those cases. The fact that WEA's receipt of agency fees was facilitated by provisions of the State's public-sector labor-relations laws does not cut against the application of strict scrutiny, for it was equally the case that the corporations whose election-related expenditures

were regulated in *Austin* and *MCFL* had benefited from significant "state-created advantages." Nor is there any merit to the suggestion that the statute regulates only WEA's use of "other people's money" and thus burdens no First Amendment interest of WEA in political expression. While the funds within the union's possession that are encumbered by Section 760 were received from others, the same was true of the corporate funds in *Austin* and *MCFL*, but the Court nonetheless applied strict scrutiny to the statutes regulating corporations' use of their general treasury funds for political speech. Petitioners' objection that Section 760 does not restrict unions' use of member dues is misplaced for the same reason; and, in addition, it flies in the face of the very theory upon which the State prosecuted and won this case.

2. Neither of the two possible justifications for Section 760—protecting the public's interest in the integrity of elections, and providing additional protection for the First Amendment nonassociational rights of individual agency fee payers—offers a compelling governmental interest to which Section 760 is narrowly tailored.

a. Section 760 cannot be justified as a regulation of campaign spending. In the first place, it sweeps far too broadly in limiting union spending not just with respect to the election of candidates for political office but also in support of or in opposition to ballot propositions submitted to the electorate. While this Court has upheld certain restrictions on unions' and corporations' use of their general treasury funds for candidate elections, it has consistently held that the rationale that justifies such restrictions—the danger of the corruption of elected representatives through the creation of political debts—does not support similar restrictions on spending treasury funds for ballot questions. *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978). This distinction is of the essence, for the principal use of its treasury funds that formed the basis for the State's prosecution of WEA—and the trial

court's finding of a violation of Section 760—was WEA's spending on ballot propositions; the undisputed fact is that WEA made *no* candidate contributions or expenditures from general treasury funds. Because of its substantial overbreadth, Section 760 is unconstitutional on its face even if it could constitutionally be applied to spending on candidate elections, or to the internal communications or PAC administration on which some of WEA's general treasury funds were spent.

A second, independent reason why Section 760 does not further a compelling interest in protecting the integrity of the electoral process is its underinclusiveness. Section 760 attempts to ensure that union electoral spending represents the views of those from whom the union's funds were obtained—while requiring no such assurance at all with respect to corporate shareholders or members who, like union agency fee payers, may harbor objections to the corporation's election-related political advocacy. The omission is perverse, because the union nonmembers with respect to whom the statute imposes its affirmative authorization requirement constitute the one class of individuals who—in contrast to corporate shareholders or members—already have the opportunity, by noting a simple objection, to prevent the use of their fees for political purposes with which they disagree. As this Court explained in *Austin*, the availability of the agency fee objection procedure means that "the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury." 494 U.S. at 663. Section 760 turns *Austin* on its head. Such underinclusiveness not only undermines the rationale for the restriction of union speech, but in the election context it raises the prospect that the political process is being skewed by one-sided regulation.

b. Nor does Section 760 further a compelling interest in protecting individual agency fee payers' First Amendment rights against compelled speech. The Washington Supreme

Court held that the statute was *not* enacted for this purpose: "The intent of the statute was to protect the public, not individual employees." Pet. App. 23a. That determination is not only authoritative but clearly correct, as shown by the statutory statements of findings and intent. And the asserted purpose of protecting fee payers' First Amendment rights is belied by the fact that Section 760 applies only to unions' *election-related* expenditures, ignoring other union political expenditures that have exactly the same impact on nonmembers' First Amendment rights.

Even if Section 760 had in fact been enacted for the purpose of protecting nonmembers' First Amendment rights, that purpose would not provide a compelling justification for the statute's restriction of WEA's political speech. The nonmember's First Amendment right lies in not being compelled to finance union political and ideological activities to which she objects, but that right already is independently protected by the objection procedures required by this Court's decisions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny. Where, as here, the nonmember can avoid supporting the union's political activities simply by stating an objection, there is no compelled speech.

As the fee payers' First Amendment rights against compelled speech are already protected, petitioners defend Section 760 as protection for nonmembers who are "too busy" or simply "forget" to assert their objection, but such concerns are too insubstantial to justify Section 760's restrictions on political expression. Nor is there any compelling interest in protecting people from having to speak up if they wish to assert their First Amendment rights to object—especially where, as here, nothing more than a general objection, submitted by mail to the union's administrative offices, is needed.

3. Striking down Section 760 as an unconstitutional restriction of political speech would not imperil any other federal or state agency shop or campaign finance legislation.

The unconstitutionality of this *sui generis* statue that encumbers the union's use of funds lawfully in its possession does not rest on any proposition that unions have a constitutional right to receive agency fees. The states are entirely free, in regulating their public-sector labor relations, either to decline to authorize any agency fee or to authorize a fee only in an amount corresponding to the union's expenditures that are germane to collective bargaining. Nor is the validity of any extant campaign finance statue even remotely at issue here. Neither the Federal Election Campaign Act ("FECA") nor the various state laws petitioners cite share the characteristics that render Section 760 constitutionally infirm. These statutes restrict spending only with respect to candidate elections and not with respect to ballot propositions, and they impose their restrictions evenhandedly on unions and corporations alike. None would be called into question by a judgment that Section 760 unconstitutionally burdens WEA's First Amendment right to engage in political speech on ballot propositions of concern to the employees it represents.

ARGUMENT

The heart of the State's case against WEA, and the essence of the trial court's ruling in its favor, is this: WEA violated Section 760 by using its general treasury funds, derived primarily from membership dues payments and only in small part from agency fee payments, for political speech—principally speech in support of or in opposition to ballot propositions submitted to the Washington electorate—without first having secured "affirmative authorization" for that action from each of its nonmember fee payers. Such political speech is "at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776. Section 760 cannot survive the strict scrutiny under which restrictions on political speech must be judged, because there is no compelling interest that justifies the statute's limitation of WEA's right to speak, with

funds lawfully in its possession, on issues of public policy presented to the voters of the State.

So that there is no room for confusion on this score, we emphasize at the outset that—contrary to the assertions of petitioners and their *amici*—our contention that Section 760 does not pass constitutional muster is not in any way dependent on the proposition that unions have some constitutionally protected right to collect and use agency fees for political activity. As we discuss in Part III, those states whose laws do authorize an agency fee in public-sector employment most certainly may, consistent with the Constitution, draft those laws so as to ensure that no nonmember who pays an agency fee—whether an "objector" or not—provides even a penny of support for the union's political activity.

Of equal moment, our argument that Section 760 is unconstitutional does not turn on any assertion of a constitutional right to finance contributions to or expenditures on behalf of candidates for public office out of the union's general treasury funds (as opposed to separate political action committee funds financed by voluntary contributions). This Court's cases make clear that a state may generally prohibit such uses of union and corporate treasury funds, but no such candidate-related contributions or expenditures are at issue here.

In enacting 760, however, and in enforcing it against WEA, the State has restricted the union's First Amendment right to engage in election-related political advocacy, without narrow tailoring to advance a compelling governmental interest. For that reason the court below rightly struck down the statute as in violation of the First Amendment.

I. AS A RESTRICTION ON WEA'S POLITICAL EXPRESSION FINANCED BY FUNDS LAWFULLY IN ITS TREASURY, SECTION 760 IS SUBJECT TO STRICT SCRUTINY

A. Section 760 restricts a union's use of funds lawfully in its treasury for certain election-related purposes. As the Washington Supreme Court explained, in interpreting Section 760 and its interplay with the State's agency shop legislation:

> [U]nder the agency shop provisions, the union is entitled to collect a fee equivalent to 100 percent of union dues from nonmembers in the bargaining unit. . . . [Section 760] then encumbers the use of such funds by prohibiting their expenditure for political speech absent affirmative authorization by the agency fee paying nonmember.

Pet. App. 30a. Thus, as the court below put it, "the statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech." *Id.* at 30a-31a (emphasis in original).[7] This restriction on the union's use, for purposes of political speech, of funds that are lawfully in its possession must be judged under the standard of strict scrutiny.

Section 760 is, in the first place, a limitation of speech on the basis of its political content, and such content-based speech limitations are subject to strict First Amendment scrutiny. With one exception, Washington permits unions to use their general treasury funds derived in part from agency fees (whether collected from public-sector employees pursuant to state law, or from private-sector employees under federal law) for any purpose or for any kind of speech—including making charitable contributions, publishing the union's views on public issues, or lobbying the legislature—without the precondition of first obtaining affirmative author-

---

[7] This construction of the statute by the highest state court is, of course, authoritative. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

ization from each and every fee payer. Only if the union chooses to make contributions or expenditures related to an election does the State impose the requirement of individual fee payer authorization.

Section 760 is, in this respect, like the statute at issue in *Burson v. Freeman*, 504 U.S. 191 (1992), which prohibited political campaigning within 100 feet of a polling place. The Court evaluated that statute through the lens of strict scrutiny as a content-based restriction on speech, because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." *Id.* at 197 (plurality op.); *see also id.* at 217 (Stevens, J., dissenting); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536-541 & n.10 (1980) (regulatory order prohibiting a utility from using its monthly billing envelopes to transmit materials on "controversial issues of public policy" was content-based and subject to strict scrutiny).

Section 760 does not simply single out political speech; it "burdens the exercise of political speech." *Austin*, 494 U.S. at 657. As this Court explained in striking down a state statute that prohibited corporations from making expenditures in connection with ballot initiatives:

> Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," "and the burden is on the government to show the existence of such an interest." Even then, the State must employ means "closely drawn to avoid unnecessary abridgment . . . ."

Bellotti, 435 U.S. at 786 (citations omitted).

Under Section 760, a union "is *not* free to use its general funds for [political] advocacy purposes." *MCFL*, 479 U.S. at 252 (emphasis in original); *see also Austin*, 494 U.S. at 658. Rather, like the statutes at issue in *Austin* and *MCFL*—both

of which restricted corporate expenditures for electoral purposes—Section 760 dictates that only funds received in a manner that satisfies the statute's standards of voluntariness may be used for core political speech. The statute thus restricts on its face the extent to which funds lawfully in a union's possession may be used for election-related expenditures.[8] And, restrictions that "burden expressive activity" —like those that "stifle ... speech entirely"—"must be justified by a compelling state interest." *Austin*, 494 U.S. at 658 (applying strict scrutiny to requirement that corporations make electoral expenditures only from separate segregated funds); *see also id.* at 708 (Kennedy, J., dissenting) ("That the avenue left open is more burdensome than the one foreclosed is 'sufficient to characterize [a statute] as an infringement on First Amendment activities.'"); *MCFL*, 479 U.S. at 251-56 (plurality op.); *id.* at 266 (O'Connor, J., concurring).[9]

B. The efforts of petitioners and their *amici* to dispute that strict scrutiny is required are unavailing.

---

[8] And, as in *Austin*, 494 U.S. at 657-58, and *MCFL*, 479 U.S. at 252-55, the statute also burdens the union's ability to engage in political speech through additional administrative requirements—here, in the form of the extensive accounting and recordkeeping obligations, including the requirement that the union separate the costs of its communications with its members on election-related subjects from the costs of its communications with its members on other subjects, that the trial court's permanent injunction required. *See* J.A. 209-10.

[9] Contrary to the Davenport petitioners' assertion, this Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), does not say that "[o]nly a complete ban on political expression, not its mere regulation, raises serious First Amendment concerns." Davenport Br. at 42 (citing 540 U.S. at 204). To the contrary, *McConnell* applied strict scrutiny even though the measure before the Court was not a complete ban on expression. *See* 540 U.S. at 204-05. Indeed, in *FEC v. Beaumont*, 539 U.S. 146 (2003), decided just six months before *McConnell*, the Court noted: "It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself." *Id.* at 162.

1. Contrary to *amicus* United States, the fact that—as to public-sector unions—the union's receipt of agency fees has been "facilitated by the state agency-shop laws," United States Br. at 29, does not distinguish the instant case from *Austin* and *MCFL*. In both of those cases the corporations regulated by the challenged statutes had "benefit[ed] from significant 'state-created advantages,'" *FEC v. Beaumont*, 539 U.S. 146, 160 (2003) (quoting *Austin*, 494 U.S. at 659), which enabled those entities to amass funds for political expenditures. *Austin*, 494 U.S. at 659-63, 665-66. Thus, on a parity to the Government's reasoning, the statutes challenged in *Austin* and *MCFL* were ones that set conditions on the grant to corporations of the "state-created advantages" noted by the Court. But the Court nevertheless subjected those restrictions on the corporations' political contributions and expenditures to strict scrutiny. *See id.* at 657-58; *MCFL*, 479 U.S. at 256.

Strict scrutiny therefore would be required in this case even if, as petitioners and their *amici* would have it, Section 760 should be viewed as simply placing a condition on the State's authorization, through its public-sector labor-relations laws, of an agency fee. *See, e.g.*, United States Br. at 12. But it is very much to the point that Section 760 *cannot* fairly be characterized in that manner. Section 760 does not target the public sector, in which it is indeed the State that authorizes the agency shop. Rather, Section 760 purports to bar not only public-sector but also private-sector unions from "using" agency fees for electoral purposes. It does so even though agency fees in the private sector, where labor relations are governed by federal law, are not the product of any state statutory authorization. For this reason as well, there is no basis for the suggestion that Section 760 should be subject to less than strict scrutiny on the theory that it is merely a condition on "state-created advantages."

2. Petitioners and their *amici* also err in suggesting that no First Amendment interest is implicated by Section 760

because that the provision is one that regulates unions' use of "other people's money." *See* United States Br. at 7-8, 14; Inst. for Justice Br. at 6, 12; American Leg. Exchange Council Br. at 4. *Austin* and *MCFL* belie that assertion. As the Washington Supreme Court correctly noted, Section 760 is not a limitation on the amount of the agency fee that a union may collect, but rather on the uses the union may make of that money; it "encumbers the use of . . . funds . . . [that] are *in the union's possession.*" Pet. App. 30a-31a (emphasis added). Of course, those funds were received from others, but the same was true in *Austin* and *MCFL*. In those cases, the asserted purpose of the challenged statutes was to "prevent[] an organization from using an individual's money for [electoral] purposes that the individual may not support." *MCFL*, 479 U.S. at 260; *see also FEC v. National Right to Work Comm.*, 459 U.S. 197, 207-08 (1982) ("*NRWC*"); *Austin*, 494 U.S. at 663. Nonetheless, the Court held that the statutes regulating the corporations' use of their general treasury funds for political speech were subject to strict scrutiny. *Id.* at 657-58; *MCFL*, 479 U.S. at 256.

3. In the same vein, petitioners contend that Section 760 implicates no First Amendment interest of the union, on the theory that "[w]hatever First Amendment rights the union has with regard to dues paid by its members, § 760 does not impact those rights because § 760 does not apply to members' dues." State Br. at 36-37; *see also* Davenport Br. at 2.

This attempt to deny that Section 760 has any impact at all on WEA's right to engage in political expression is fundamentally misplaced, for reasons we have already addressed. Whatever the original source of the moneys, Section 760 limits WEA's use, for electoral purposes, of funds that are lawfully in its possession, and this restric[illegible] on the union's ability to engage in political speech must be evaluated under the test of strict scrutiny.

But even on its own terms petitioners' argument fails for the simplest of reasons: it is precisely opposite to the State's

theory—and the trial court's ruling based on that theory—as to why WEA committed a violation of Section 760 in the first place. In the trial court, WEA argued that it had not violated the statute because it always had far more income from members' dues than the amount it spent for electoral purposes, and that under these circumstances it had not "used" agency fees for those purposes. *See* J.A. 161-63, 175-78, 192-93; R.P. 760-61. The trial court rejected that argument and did so on the theory advanced by the State and its accounting expert. The court held that once WEA received nonmembers' agency fees, in the amounts provided by state law, it violated Section 760 by making *any* expenditures from its treasury for the political purposes identified by Section 760—notwithstanding that nearly 85% of its treasury funds derived from membership dues payments and another 11% came from miscellaneous non-agency-fee sources—unless WEA were able to obtain the affirmative authorization for such expenditures from every one of its 3,000 to 4,000 nonmembers who paid agency fees. *See supra* pp. 10-11. Making electoral expenditures from WEA's general fund, the court said, was "a clear-cut *use* of the total funds available for the given purposes in proportion to the source of the funds." Pet App. 106a-107a (emphasis in original).

In short, the State prosecuted WEA, and the trial court found WEA to have violated the statute, based on WEA's use for political advocacy of its general treasury funds that the union previously had properly received from members as dues and secondarily, as a small percentage of the total, from agency fee payers pursuant to Wash. Rev. Code § 41.59.100. The State's prosecution theory and the trial court's ruling leave no room for petitioners' claim that Section 760 does not implicate the union's First Amendment right to engage in political speech.[10]

---

[10] A footnote in the State's brief appears to suggest that WEA would not have violated Section 760 if it had refunded a portion of the agency

II. SECTION 760 IS NOT NARROWLY TAILORED TO ADVANCE A COMPELLING GOVERNMENTAL INTEREST

Whether Section 760 is defended as a measure to protect the integrity of the electoral process, or as additional protection for the First Amendment rights of individual nonmembers who pay agency fees, the interests assertedly justifying this regulation of unions' political speech cannot bear scrutiny.

A. Section 760 Is Not Narrowly Tailored To Further A Compelling Governmental Interest In The Integrity Of The Electoral Process

As the Washington Supreme Court emphasized, Section 760's purpose is to "protect the integrity of the election process." Pet. App. 22a. In this instance that purpose does not provide a compelling interest justifying the statute's restriction on speech for two independent reasons. First, Section 760 is fatally overbroad in that it regulates union contributions and expenditures in connection with ballot propositions. Second, the statute is perversely underinclusive in imposing an affirmative authorization requirement with respect to union nonmembers who already have an independent right to prevent the use of their fees for political purposes they oppose, but not with respect to corporate shareholders or members who have no such right.

---

fee to nonmembers. State Br. at 40-41 n.10. Even assuming the correctness of that proposition notwithstanding the Washington Supreme Court's interpretation of the statute as regulating not the amount of the agency fee but the union's use of its funds, Pet. App. 30a-31a, it would not change the fact that Section 760 seriously burdens the union's First Amendment right to engage in political expression—both by requiring it to forgo a portion of the agency fee to which it was otherwise entitled if it wished to expend any funds for purposes of electoral advocacy, and by imposing elaborate record-keeping and accounting requirements, *see supra* note 8.

1. *The State Lacks A Compelling Interest That Justifies Restricting Union Contributions And Expenditures On Ballot Propositions*

Section 760 sweeps broadly and indiscriminately in regulating union spending "to influence an election or to operate a political committee." In particular, the statute reaches beyond the election of *candidates for political office* to encompass votes on *ballot propositions*. This broad reach of the statute is of the essence here, for the undisputed fact is that WEA made no candidate contributions or expenditures at all from its general treasury funds. Rather, WEA was found to have violated Section 760 principally because of its contributions with respect to various ballot propositions—including notably four statewide initiatives on issues of education policy and numerous local school district tax levy questions. *See supra* pp. 1-2, 11.[11] The State has no compelling interest that justifies restricting that form of political speech, and Section

---

[11] Apart from this spending on advocacy with respect to ballot propositions, WEA also used treasury money for internal political communications with its own members and in-kind contributions to cover the administrative costs of its political action committee. Both of these uses came within the purview of Section 760, at least on the trial court's interpretation. That is so even though the Federal Election Campaign Act ("FECA"), for example, does not restrict union expenditures from treasury funds for a union's internal political communications with its members. *See* 2 U.S.C. § 441b(b)(2)(A); *see also United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 121 (1948) (expressing the "gravest doubt" as to the constitutionality of any restriction on internal corporate or union political communications with members or shareholders). So too, FECA allows a corporation or union to use treasury funds to defray the administrative costs of its multi-candidate political action committee, *see* 2 U.S.C. § 441b(b)(2)(C), recognizing that such expenditures do not present the dangers that justify strict regulation of contributions to candidates. The Court need not explore the constitutionality of Section 760 as applied to these uses of WEA's general fund, however, because the statute's substantial overbreadth resulting from its application to ballot propositions is sufficient to render Section 760 unconstitutional.

760 therefore is facially invalid because of its substantial overbreadth.

a. In each of the cases, such as *Austin*, *Beaumont*, and *NRWC*, in which this Court has upheld statutes prohibiting corporations or unions from making election contributions or expenditures from general treasury funds, as in cases involving dollar limits on campaign contributions and expenditures, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 25-29 (1976); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390-95 (2000), the Court has relied on a rationale unique to candidate elections—the danger of corruption in the form of political debts, or the appearance thereof—which the Court specifically has stated is *not* applicable to ballot initiatives. *See NRWC*, 459 U.S. at 210 n.7 (noting that FECA applies only to candidate elections where, "unlike in referenda on issues of general public interest, there may well be a threat of real or apparent corruption"); *Beaumont*, 539 U.S. at 162 (noting that "strict solicitation limits" have been upheld as to candidate contributions but not as to other political expenditures).

Thus, where this Court has been confronted with statutes attempting to restrict contributions or expenditures from general treasury funds in connection with ballot initiatives, it has struck them down, even where a similar restriction as to candidate contributions would have been permissible. The leading case is *Bellotti*. There, the Court invalidated a statute that prohibited corporations from making treasury money contributions and expenditures to influence the vote on referendum proposals. The state sought to justify the prohibition by its "interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government," 435 U.S. at 787, as well as its interest in "protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation." *Id.* While reaffirming the constitutionality of legislation prohibiting corporate or union contributions or expenditures from

general treasury funds with respect to the election of candidates for political office, *id.* at 788 n.26, the Court held that the governmental interest that justified such restrictions—"the problem of corruption of elected representatives through the creation of political debts," *id.*—did not support the attempt to restrict expenditures on ballot propositions: "However weighty these interests may be in the context of partisan candidate elections, they either are not implicated in this case or are not served at all, or in other than a random manner, by the prohibition" of expenditures on ballot propositions. *Id.* at 787-88; *see also id.* at 790 ("The risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue.").[12]

Three years after *Bellotti* was decided, the Court again drew a sharp distinction between candidate elections and ballot propositions. In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Court invalidated an ordinance that placed a $250 limit on contributions to committees supporting or opposing ballot measures—notwithstanding that it had previously upheld limits on contributions to political *candidate* committees. 454 U.S. at 297 (citing *Buckley*, 424 U.S. at 26-27). The Court squarely held that *Buckley*'s rationale was not compelling with respect to ballot propositions:

> Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees

---

[12] The Court has continued to cite *Bellotti*, in subsequent cases affirming restrictions on candidate contributions, as having established that such restrictions are not permissible when applied to expenditures in support of ballot initiatives. *See NRWC*, 459 U.S. at 210 n.7; *FEC v. National Conservative PAC*, 470 U.S. 480, 495-96 (1985) ("*NRWC* is consistent with this Court's earlier holding [in *Bellotti*] that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.").

> there is no significant state or public interest in curtailing debate and discussion of a ballot measure.

454 U.S. at 299.

Unlike candidate contributions, which do not necessarily convey a message on any particular public issue, *see Beaumont*, 539 U.S. at 161-62, and which present the danger of creating political debts, contributions or expenditures in support of or in opposition to ballot questions constitute pure issue advocacy. Not surprisingly, therefore, the federal government and the states that prohibit corporations and unions from making campaign contributions or expenditures from their general treasury funds do so only with regard to *candidate* elections—not ballot propositions.[13] As these jurisdictions have recognized, there is no compelling governmental interest that supports the restriction placed by Section 760 on political advocacy on ballot propositions, and that restriction plainly cannot withstand First Amendment scrutiny.

b. Thus, even if Section 760 could be applied constitutionally to candidate contributions or expenditures, which no one alleges WEA made from its general treasury funds—and even if it were to be assumed that Section 760 could be

---

[13] *See* Campaign Legal Center ("CLC") Br. at 17 n.6 & Appendix. While CLC recognizes in the text of its brief that the statutes of the 14 states it identifies regulate only "labor union and corporate *candidate-related* political activity," *id.* at 17 (emphasis added), CLC's Appendix notes this limitation (or in some cases a limitation on contributions to either candidates or their political parties) for only eight of those states, while using the broad term "political contributions" to describe the statutes of the other six. It is the case, however, that *none* of these state restrictions applies to contributions or expenditures on ballot propositions. *See* Mich. Comp. Laws § 169.254(3); Mont. Code Ann. § 39-31-402(3); Pa. Stat. Ann. tit. 25, § 3253(a); *id.*, tit. 43, § 1101.1701; 2006 R.I. Pub. Laws 292, § 1 (amending R.I. Gen. Laws § 17-25-10.1(j) to delete applicability to ballot questions); S.D. Codified Laws § 12-25-2; Wyo. Stat. Ann. § 22-25-102(a). Similarly, the Federal Election Campaign Act places no restrictions on union and corporate political activity except as it relates to the election of candidates for political office. *See* 2 U.S.C. § 441b(a).

applied constitutionally to WEA's treasury money spending on internal membership communications and on administering its political action committee, *see supra* note 11—it is nonetheless apparent that the statute sweeps far too broadly in restricting WEA's political advocacy on ballot initiatives. Because Section 760 "reaches a substantial amount of constitutionally protected conduct," it is "facially invalid even if [it] also ha[s] legitimate application." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). As the record in this case makes abundantly clear, Section 760's "application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell v. FEC*, 540 U.S. 93, 207 (2003) (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)).

2. *The Statute's Underinclusiveness Demonstrates That Section 760 Is Not Narrowly Tailored To Further Any Compelling Interest In Ensuring That An Organization's Electoral Contributions And Expenditures Represent The Views Of Those Who Provide The Funds*

The perverse underinclusiveness of the statute's individual authorization requirement provides a second, independent reason why Section 760 cannot survive strict scrutiny. Section 760 provides for hyper-vigilance on behalf of union nonmember fee payers who have not exercised their independent right to object to the union's electoral spending but who may harbor an objection that they failed to assert, while turning a blind eye to corporate shareholders or members who harbor objections to the corporation's electoral spending and have been afforded no opportunity at all to make any such objection.

In *Bellotti*, this Court reasoned that, where a statute requires only one class of entities to establish that the funds the entity wishes to spend on politics represent the views of

the individuals who provided the funds, the exclusion of other classes of entities from such a requirement "undermines the plausibility of the State's purported concern for the persons who happen to be [constituents of the entities that are] covered by [the challenged provision]." 435 U.S. at 793. Particularly is this true where "minorities in [other] groups or entities may have [comparable] interests with respect to institutional speech . . . ." *Id.*

Here, the "plausibility" of the contention that Section 760 is designed to ensure that union electoral spending represents the views of the individuals whose money is being used is "undermine[d]," *id.*, by the absence of any requirement that corporations obtain individual authorization from their shareholders (in the case of business corporations) or members (in the case of nonprofit corporations such as those in *Austin*, *MCFL*, *NRWC*, and *Beaumont*) before spending "an individual's money for purposes that the individual may not support." *MCFL*, 479 U.S. at 260.[14] After all, *Austin* teaches that there is a *stronger* justification for such legislation in the case of corporations than in the case of unions—precisely because "[a]n employee who objects to a union's political activities . . . can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive rep-

---

[14] Even viewed standing alone, the attempt to protect the electoral process against the apathy of union nonmembers who fail to take advantage of an opportunity to prevent the use of their fees for political purposes with which they disagree because they are "too busy" or "simply forget," State Br. at 34, or "do not understand" the notice sent to them, Davenport Br. at 7, is anything *but* compelling. It is one thing to hold that the government has a compelling interest in prohibiting corporate or union contributions or expenditures in connection with candidate elections financed by treasury money amassed from individuals who have been given no opportunity to object to that use of their funds; it would be quite another thing to hold that there is a compelling interest in ensuring that individuals who did not avail themselves of such an opportunity made a sufficiently reasoned decision in that regard.

resentative of the bargaining unit on labor-management issues." *Austin*, 494 U.S. at 665-66.[15]

This ready availability of a mechanism by which non-member fee payers can, without losing the benefits of union representation, avoid any obligation to pay the portion of union dues corresponding to political (and other non-germane) activities—in contrast to the situation of a corporate shareholder or member, who cannot prevent the corporation from using his or her money for political expenditures unless the individual is prepared to give up *all* benefits of association with the corporation, *see id.* at 663—means that "the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury." *Id.* at 665-66.

The State of Washington has turned *Austin* on its head by restricting union political spending through Section 760 while adopting no comparable restriction on corporate political spending. As in *Bellotti*, Washington's decision to concern itself with minority views within one type of participant in the

---

[15] There are, of course, certain advantages that union members enjoy and nonmembers do not—such as the right to participate in the union's governance or in various union-provided group insurance or legal services programs—but those who have elected not to become union members have already chosen to forgo those benefits of union membership, and the additional step of objecting to paying for the union's political and other non-germane expenditures entails no further loss of any benefits. Unlike corporate shareholders who would be required to sell their shares in order to dissociate themselves from the corporation's political positions—and thus lose the investment advantages they presumably saw in holding such shares—nonmembers who pay agency fees lose *nothing* by choosing to become objectors. Thus, just as "[o]ne need not become a member of the Michigan Chamber of Commerce or the Sierra Club in order to earn a living," *Austin*, 494 U.S. at 710 (Kennedy, J., dissenting), the ability of an agency shop employee to earn a living without being forced to associate with the union's political views is fully protected by the availability of an objection under *Abood* and *Hudson*.

political process (unions) while allowing other participants—particularly corporations—to use all of their resources for electoral expenditures without regard to any minority views, "raises serious doubts about whether [the State] is, in fact, serving, with this statute, the significant interests" of protecting the integrity of elections. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). As Justice Scalia has put it, "a law cannot be regarded as protecting an interest 'of the highest order,' . . . and thus as justifying a restriction upon . . . speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 541-42 (Scalia, J., concurring); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-26 (1993).

In the context of legislation regulating participation in the electoral process, underinclusiveness of the kind that plagues Section 760 is particularly problematic. Not only does it "diminish the credibility of the government's rationale for restricting speech in the first place," *City of Ladue*, 512 U.S. at 52, but it has the even more serious vice—whether intended or not—of "altering political debate by muting the impact of certain speakers," *Austin*, 494 U.S. at 704 (Kennedy, J., dissenting), and thus skewing the political process in a particular direction.

B. The Statute Was Not Intended To Protect The First Amendment Rights Of Individual Agency Fee Payers Nor Does It Do So

Notwithstanding that it is part of an Act governing election campaign practices, petitioners and their *amici* almost uniformly endeavor to defend Section 760 not as a measure aimed at protecting the integrity of the electoral process, but rather as if it were a statute whose purpose was to protect the First Amendment rights of the individual nonmembers who pay agency fees. Indeed, the Washington Supreme Court noted that "the only interest asserted" in that court as

justifying the restriction imposed by Section 760 "is additional protection for nonmembers' First Amendment rights." Pet. App. 26a. As we now show, however, providing such "additional protection" to individual agency fee payers was simply not the Washington electorate's purpose in adopting Initiative 134 and Section 760. And, even if it were, that justification for the statute can no more withstand strict scrutiny than could the justification based on protecting the integrity of the electoral process that we have just discussed.

1. *As The Washington Supreme Court Held, The Purpose Of The Statute Was Not To Enhance The Rights Of Individual Employees But To Protect The Public's Interest In The Integrity Of Elections*

The first fatal flaw in petitioners' attempt to justify Section 760 as a statute whose purpose is to provide additional protection for the First Amendment rights of nonmember agency fee payers is that this simply was *not* the statute's purpose. That is the authoritative—and clearly correct—holding of the Washington Supreme Court.

Addressing the same argument as petitioners advance here, the Washington Supreme Court held squarely:

> [T]here is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles. Rather, as we have previously stated, the principal thrust of I-134 was to protect the integrity of the election process from the perception that elected officials are improperly influenced by monetary contributions and the perception that individuals have an insignificant role to play. . . . *The intent of the statute was to protect the public, not individual employees.*

Pet. App. 22a-23a (emphasis added); *see also id.* at 12a. That explanation of what is and is not the purpose of Section 760 is authoritative. This Court "must, of course, accept the state court's view of the purpose of its own law . . . ." *U.S. Term*

Limits, Inc. v. Thornton, 514 U.S. 779, 829 (1995); *see also Romer v. Evans*, 517 U.S. 620, 626 (1996) (deferring to state supreme court's description of the statutory "objective" as "the authoritative construction").

The Washington Supreme Court's "view of the purpose of its own law" as having nothing to do with providing additional protection for the First Amendment rights of agency fee payers was, moreover, clearly correct. Petitioners point to no evidence whatever that Section 760 was enacted for the purpose of protecting the First Amendment interests of the individual nonmembers who pay agency fees, and—to the contrary—the Act's declarations of "findings," Wash. Rev. Code § 42.17.610, and "intent," *id.*, § 42.17.620; *see supra* pp. 5-6, confirm the view of the court below that "[t]he intent of the statute was to protect the public, not individual employees." Pet. App. 23a.

Furthermore, the ballot title submitted to voters[16] was addressed solely to election campaign activities; and the one-line description of Section 760 in the voter pamphlet distributed in connection with Initiative 134 "does not mention either the constitution or the protection of the nonmember." *Id.* at 11a-12a. Finally, Section 760—like all of the Act and the rest of Chapter 42.17—is administered, interpreted, and enforced by the PDC, an administrative agency charged solely with overseeing Washington's campaign finance and disclosure laws, *see* Wash. Rev. Code § 42.17.360, but which has no authority with regard to matters of public employee labor relations.

The scope of Section 760, too, demonstrates that the statute's purpose is to regulate the electoral process, not to

---

[16] "Shall campaign contributions be limited; public funding of state and local campaigns be prohibited; and campaign related activities be restricted?" *See Washington Fed'n of State Employees v. State*, 901 P.2d 1028, 1031 (Wash. 1995).

provide additional protection for the rights of agency fee payers. The statute applies only to unions' electoral expenditures and not to any of the other political or ideological expenditures unions typically make that equally implicate nonmembers' First Amendment rights against compelled speech. Most strikingly, the statute restricts expenditures on ballot initiatives but has no application to expenditures for lobbying the legislature, despite the fact that the initiative process and the legislative process are simply alternative methods of enacting legislation. Thus, had the legislation on vouchers, charter schools, cost-of-living adjustments for educators, and class size on which WEA made expenditures been proposed in the legislature rather than through the initiative process, WEA would not have violated Section 760 in spending money to support or oppose those measures.

In *Bellotti*, the Court found that the asserted purpose of "protect[ing] corporate shareholders . . . by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree," 435 U.S. at 792-93, was belied by the "self-evident" underinclusiveness of the statute, under which "[c]orporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted." *Id.* at 793; *see also Austin*, 494 U.S. at 686 (Scalia, J., dissenting) (finding protection of shareholder interests an "implausible explanation" for a statute prohibiting corporate independent expenditures for candidates but otherwise "permit[ting] corporations to take as many ideological and political positions as they please"). That Section 760 similarly regulates union spending on ballot propositions but not legislative lobbying further supports the authoritative determination of the court below that the statutory concern is with the integrity of the electoral process—and not with providing additional protection for individual nonmembers' First Amendment rights.

That conclusion should end the inquiry. This Court has made clear, in applying strict scrutiny to discriminatory classifications under the Equal Protection Clause, that a hypothetical interest "based upon speculation about what 'may have motivated' the legislature" is insufficient: "To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' . . . ." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 & n.16 (1982)); *see also United States v. Virginia*, 518 U.S. 515, 535-36 (1996). In the First Amendment context, where "the State's highest court has not shed additional light on the statute's purpose" the Court sometimes has been willing to discern that purpose from the statute's "text and history." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-68 (1991). Here, the Washington Supreme Court, by authoritatively explicating the statute's purpose, has made it unnecessary to undertake that inquiry—and in any event the statute's "text and history" fully support that court's determination.

We know of no case in which this Court has upheld a statute against First Amendment challenge on the basis of an allegedly compelling governmental interest that the state supreme court authoritatively determined was *not* the statute's "actual purpose." Thus, the Washington Supreme Court's well-supported determination that it was *not* the objective of the Washington electorate, in enacting Initiative 134 and Section 760, to "provide more protection for non-members than that offered under federal constitutional principles," Pet. App. 22a, is fatal to petitioners' attempt to justify Section 760 on that ground.

2. *No WEA Agency Fee Payer Is Forced To Support Political Causes With Which He Or She Disagrees, And There Is No Compelling Interest In Protecting Nonmembers Against Being "Too Busy" Or "Forgetting" To Assert Their Right Not To Provide Such Support*

Even if Section 760 had in fact been adopted with the purpose of protecting nonmembers' First Amendment rights against compelled speech, that purpose would not provide a compelling justification for the statute's infringement on WEA's right of political expression. In the first place, the underinclusiveness problem, which we have just discussed, in itself shows that the statute is not narrowly tailored to serve a compelling interest, for "a law cannot be regarded as protecting an interest 'of the highest order,' . . . and thus as justifying a restriction upon . . . speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring).

But there is another reason why Section 760 serves no compelling interest in protecting fee payers' constitutional rights: this First Amendment interest is independently protected by the *Hudson* procedures required by this Court's cases, and the remaining interests on which petitioners rely are insubstantial.

a. The dissenting opinion in the court below opens with Thomas Jefferson's aphorism that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." Pet. App. 34a (Sanders, J., dissenting). Jefferson was right, of course, and this Court has subsequently held that when backed by state action such compulsion is not only sinful but unconstitutional. *Abood*, 431 U.S. at 232-37.

But the injury recognized by Jefferson lies in being "*compel[led]*" to support opinions an individual opposes; and the constitutional right recognized by *Abood* and this Court's

subsequent cases is the right not to be "require[ed] . . . as a condition of holding a job" to finance union political and ideological activities. *Id.* at 235. These activities must be financed only from the dues and fees of "employees *who do not object* to advancing those ideas and who are *not coerced into doing so against their will* by the threat of loss of governmental employment." *Id.* at 235-36 (emphasis added); *see also Hudson*, 475 U.S. at 301-02; *Lehnert*, 500 U.S. at 517. The nonmembers' First Amendment right therefore is that they "not be charged *over their objection*," *id.* at 519 (emphasis added), for their share of the union's political and other expenditures not germane to collective bargaining. This is a right against compelled speech, and where the nonmember is permitted to avoid supporting the union's political and other nonchargeable activities simply by voicing an objection, *there is no compelled speech.*[17]

There is not, nor can there be, any contention in this litigation that this First Amendment right of any nonmember has been violated or would be violated absent the provisions of Section 760. In accordance with this Court's decisions as to what is necessary to comply with the dictates of the First Amendment, WEA annually sends each nonmember a "*Hudson* notice" in which the union explains what it spends its money for and invites the nonmember to inform it if he or she objects to paying the portion of the fee that corresponds to the union's non-germane expenditures. Any nonmember who responds by noting an objection receives a refund, with interest, of that portion of the fee. *See supra* pp. 3-5. There is no allegation in this litigation that WEA failed to follow

---

[17] The Davenport petitioners and several of the *amici* question the rule that "dissent is not to be presumed." *See* Davenport Br. at 31-38. But, as the United States correctly recognizes, it is firmly established that "unions may constitutionally use the fees for political purposes *unless a dissenter objects to such use*." United States Br. at 8 (emphasis added). The State agrees: "[N]onmembers are required to object in order to claim First Amendment protection, and 'dissent is not to be presumed.'" State Br. at 29.

these procedures scrupulously, or that WEA's procedures were in any respect inadequate to comply with the prophylactic measures this Court prescribed in *Hudson*.[18]

In short, no employee required to pay agency fees to WEA has been compelled—or in the absence of Section 760 would be compelled—to contribute to any union electoral activities. As the Washington Supreme Court correctly put it, "[a]n employee who is given a simple and convenient method of registering dissent has not been compelled to support a political cause and has not suffered a violation of his or her First Amendment rights." Pet App. 17a.[19]

b. Given that nonmember fee payers are already protected against being compelled to support political causes with which they disagree, the State defends Section 760 as a measure designed to protect nonmembers who "are too busy to take the steps necessary to communicate their objections to the union, or . . . simply forget to opt-out within the thirty-day deadline." State Br. at 34. Similarly, the Davenport petitioners note that nonmembers might not assert an objection

---

[18] If there were any such inadequacy, of course, the affected nonmembers would have a remedy either through the arbitration procedure mandated by *Hudson*, *see* 475 U.S. at 307-08 & nn.20-21, or through an action under 42 U.S.C. § 1983 in federal court. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998). Indeed, the Davenport petitioners are members of a class that previously brought such litigation against WEA, and the *Hudson* procedures WEA currently employs are those prescribed in a 1998 settlement agreement that resolved that lawsuit. *See* Def. Trial Ex. 69; R.P. 247-51.

[19] We are at a loss to ascribe any meaning to the distinction between "*maximum* First Amendment rights" and "*minimum* First Amendment rights" asserted by one *amicus*. CLC Br. at 4 (emphasis in original). While a state is of course free, as the court below recognized, to "provide greater protection to its citizens" than the federal Constitution demands, Pet. App. 22a, in doing so it is not somehow enlarging the constitutional right but rather is protecting some interest beyond that constitutional right. The relevant question—to which we next turn—is thus the substantiality of *that* interest, not of the constitutional right that, by definition, is already protected.

"because they do not receive [the *Hudson* packet], the packet comes at the busiest time of the school year, they do not understand it, or they put it away for later," Davenport Br. at 7 (citing petitioners' depositions); thus, in their view, Section 760 guards against "unwitting" or "accidental" support of political spending with which a nonmember might disagree, *id.* at 28, and protects the nonmembers against their own "inertia." *Id.* at 29.[20]

The notion that a union's right to engage in political expression can be restricted on the basis of a state interest in protecting people against being "too busy," too indifferent, or simply forgetting to assert their rights cannot withstand analysis; if there is any such interest at all, it surely cannot be described as "compelling." And, in any event, there would surely be other means of protecting such interests that are far more narrowly tailored than is Section 760. For example, if the asserted problem is that nonmembers do not understand the *Hudson* notice, it would be within the authority of the State (with respect to the public sector) to prescribe additional requirements for a union's *Hudson* notice designed to make it clearer.

Nor is there any compelling interest in protecting people from being required simply to speak up if they wish to take advantage of an exemption to which they are entitled. The

---

[20] The State's assertion that an affirmative authorization requirement "ensures" that "the wishes of the nonmembers who pay the fees" will be effectuated, State Br. at 34, is flatly contradicted by the Davenport petitioners' explanation of how "the power of human inertia" results in "people often irrationally refrain[ing] from choosing options that are of objective benefit to them." Davenport Br. at 29. That principle obviously would operate under an affirmative authorization scheme just as much as under an objection procedure. A nonmember who, if she gave the matter any consideration, might be delighted to have the union spend its money to help enact initiatives that would give education employees cost of living adjustments (Initiative 732) or reduce class size (Initiative 728), could well—because the notice arrived at a busy time of the year, or for any of the other reasons cited by petitioners—fail to provide the affirmative authorization that would correspond to her wishes.

State contends that Section 760 protects the interests of nonmembers who "simply want to remain silent" but who are "force[d] . . . to speak" if they wish to assert their right to object. State Br. at 34; *see also* Mackinac Br. at 5 ("nonmembers must forfeit their right to silence and express their objection, or they will lose their right to withhold their wages from the support of political activities with which they may disagree"). But examples abound of situations where people must speak up if they wish to take advantage of their First Amendment rights against compelled speech. Thus, the automobile owner who objects to displaying a state-mandated motto on his license plate, *cf. Wooley v. Maynard*, 430 U.S. 705 (1977), cannot avoid doing so unless he takes some action that reveals his objection. The student who wishes to be excused from participating in the pledge of allegiance, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), must make that wish known in some way. There is a fundamental difference between compelling an individual to convey "a message he disagrees with," *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005)—which is what the First Amendment protects against—and merely requiring a person who objects to engaging in particular speech to make that objection known. It is frivolous to suggest that a "compelled speech" issue arises from requiring a person to say what he wants done, so that the government (or in this case the union) can carry out his wishes.

Some of the *amici* go to great lengths—making greater use of their imaginations than of the record—in attempting to discover reasons why nonmembers must be protected from having to voice their objections. It is asserted, for example, that "[u]nder an opt-out scheme, the nonmember must stand up amid disagreeing peers, her boss, and union officials and state yet again a desire to not 'associate' with WEA and its political activity." NFIB Br. at 22; *see also id.* at 27; Inst. for Justice Br. at 12-17. By contrast, the merit of an "opt-in" procedure is said to be that it "does not require [the nonmember] to disclose

the precise nature of her political beliefs to those around her." *Id.* at 17. These arguments are doubly flawed. First, these *amici* display no familiarity with how the *Hudson* process works, as reflected in the record of this case. A fee payer wishing to object does not need to make any statement in public, let alone explain "the precise nature of her political beliefs." Rather, the fee payer receives the *Hudson* notice in the mail and objects by simply mailing a letter to WEA headquarters stating a general objection, without any need to explain the nature or extent of the objection or to set forth the nature of his or her political beliefs. *See supra* p. 4. Second, that being so, the differences between an "opt-out" and an "opt-in" system posited by *amici* are imaginary. A non-member who makes a general objection, through a letter mailed to the union's administrative offices, is in no different situation, in terms of any stigma that might attach to that action, than would be a nonmember who refused to agree to a union representative's request for "affirmative authorization" of union electoral spending.[21]

In short, the nonmembers' First Amendment interests are, without Section 760, independently protected by this Court's decisions in *Abood* and its progeny, and the additional interests asserted as justifying the statute are too insubstantial to justify the restriction Section 760 imposes on WEA's right to engage in political advocacy.

---

[21] Although it should not be necessary to do so, we note in this connection, in response to the assertions about threats of violence and the like that are found in several of the *amicus* briefs, that there is nothing whatever of this kind to be found in the record of this case, or in the "legislative history" of Initiative 134.

III. HOLDING SECTION 760 UNCONSTITUTIONAL DOES NOT CALL INTO QUESTION ANY OTHER STATE OR FEDERAL AGENCY SHOP OR CAMPAIGN FINANCE REGULATION

Petitioners' intimations that affirming the judgment below would undermine longstanding state and federal laws governing agency fees and campaign finance are unfounded. The unconstitutionality of Section 760 does not rest on any assertion of a constitutional right of unions to receive agency fees from nonmembers, and striking down this *sui generis* Washington statute will not imperil any state or federal campaign finance regulation.

A. The states have broad authority to regulate labor relations in their public-sector employment, and they have chosen a wide variety of approaches to doing so. A significant minority of the states have declined to follow the lead of Congress (in regulating the private sector) and do not provide for collective bargaining in public-sector employment at all. Of those that have established a system of collective bargaining—which in American labor law universally is based on the principle of exclusive representation of all members of a bargaining unit by the union chosen by the majority—most have recognized that provision for an agency fee is an appropriate and proper part of that system. Others have not done so, however, and there is nothing in the Constitution that requires them to. Any union right to collect an agency fee is a matter of statutory authorization, not constitutional principle, and a state is thus constitutionally free to prohibit or to decline to authorize an agency fee. *See Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

While many of the states that have authorized a public-sector agency fee have, like Washington, set the fee at an amount equal to the dues required of union members, others have authorized an agency fee that is defined so as to en-

compass only the portion of union dues that corresponds to the union's expenditures on activities germane to collective bargaining—thus excluding a wide variety of union expenditures not only on political and ideological activities but also expenditures for members-only benefits, international programs, public relations activities, charitable donations, and the like. *E.g.*, N.M. Stat. Ann. § 10-7E-4(J); Pa. Stat. Ann. tit. 43, § 1102.2; 5 Ill. Comp. Stat. 315/3(g); Md. Code Ann., Educ. § 6-504(d)(3)(iv)(l). Other states have approximated that result by setting the agency fee at a fixed percentage of union dues. *E.g.*, Minn. Stat. § 179A.06(3) (limiting agency fee to 85% of regular membership dues); N.J. Stat. Ann. § 34:13A-5.5(b) (same); Vt. Stat. Ann. tit. 3, § 902(19) (same). There is no question that a state is acting within its constitutional authority in imposing such limits on the extent to which it is willing to provide by law for a required payment of an agency fee to the exclusive representative by bargaining-unit employees who have elected not join the union.[22]

Through statutory schemes such as these, a state has ample authority, consistent with the First Amendment, to design an agency fee system for its public sector that ensures that no nonmember who pays an agency fee—whether or not an

---

[22] A statutory scheme that authorizes an agency fee limited to expenditures germane to collective bargaining (or that accomplishes roughly the same end by setting the fee at a fixed percentage of union dues) can be readily justified on the basis of a state's permissible judgment that its interest in promoting labor peace and preventing "free riding" extended only to union activities germane to collective bargaining. If, on the other hand, a state were to authorize an agency fee that included expenditures for some activities not germane to collective bargaining but excluded others, First Amendment issues of content discrimination might arise, depending on the nature of the distinctions drawn by the state and the reasons for those distinctions. But there is no need in this case to decide what level of scrutiny would apply and what governmental interests would be sufficient to justify such a statutory scheme.

"objector"—will be required to support a union's political and other expenditures not germane to collective bargaining.

That is not, however, what Washington has done here. Like a number of other states, Washington has provided in its public-employee labor relations statutes for an agency fee in an amount equal to union dues. Wash. Rev. Code § 41.59.100. As the Washington Supreme Court recognized in its authoritative interpretation of Section 760, "the statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech." Pet. App. 30a-31a (emphasis in original). That is to say, what Section 760 does is to limit—in a way that is content-discriminatory and targets speech that is at the core of what the First Amendment protects—the use to which a union may put moneys that are lawfully in its possession.

That Section 760, as the Washington Supreme Court held, is a restriction on a union's use of the funds properly in its possession, rather than a limitation on the amount of the agency fee that public-sector unions are authorized by Washington public-sector employment laws to collect, is made crystal clear by the fact that Section 760 on its face runs not only to public-sector unions but also to unions in the private sector, as to which the State has no role in authorizing the amount of the agency fee. Section 760, quite clearly, is not conceived as a limitation or condition on the agency fee the State is willing to authorize in public-sector employment; rather, it is a regulation of electoral spending by any union, public or private, that receives agency fees—whether or not the State of Washington played any role in authorizing the union to assess and collect such fees.[23]

---

[23] It is, of course, a separate question—not presented by this case—whether the application of this regulation to the private sector is pre-empted by the National Labor Relations Act or the Railway Labor Act. But it bears noting that, although a number of states have exercised the authority granted them by the NLRA to "prohibit[]" union shop or agency

The extent to which a state constitutionally may limit the amount of the agency fee it is willing to authorize its public-sector unions to collect is, in short, not a question that is presented by Section 760's restriction on unions' use of their funds for political speech.[24]

B. Similarly—and contrary to the assertion of some of the opposing briefs—holding Section 760 unconstitutional does not call into question any federal or any other state campaign finance law. *Amicus* Campaign Legal Center offers an appendix listing "opt-in" campaign finance laws from fourteen states, "all of which would seemingly be subject to challenge and invalidation if the reasoning of the Washington Supreme Court was followed." CLC Br. at 17-18; *see id.* at 17 n.6 & Appendix. As we have previously discussed, however, none of these statutes share the characteristics that make Section 760 constitutionally objectionable. All of them, as CLC recognizes, apply only to "*candidate-related* political activity," *id.* at 17 (emphasis added); none limits union spending on ballot questions or internal communications. *See supra* p. 31 & note 13. And, with the exception of a Montana agency fee statute, all of them impose their restrictions even-handedly on unions and corporations. *See* CLC Br., Appendix.

The professed concerns regarding the federal campaign finance laws are equally hollow. It is highly misleading to say without further elaboration, as do the Davenport petitioners, that "FECA prohibits unions from using their general funds for political contributions and expenditures . . . ."

---

shop arrangements in the private sector, 29 U.S.C. § 164(b); *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746 (1963), to our knowledge no state has presumed to regulate either the purposes for which private-sector agency fees may be used or the amounts at which such fees may be set.

[24] Authorizing unions to collect an agency fee is not an exercise of the State's spending power, and cases dealing with government spending and tax subsidies, *e.g.*, *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991), are therefore inapt.

Davenport Br. at 41. Like the state statutes just discussed, FECA prohibits the use of treasury funds for contributions and expenditures for candidates for public office; it has no application to contributions and expenditures on ballot questions, and it specifically exempts expenditures for internal communications and for PAC administration. 2 U.S.C. § 441b(a), (b)(2)(A), (C). Equally to the point, FECA applies its prohibitions on the use of treasury funds to unions and corporations alike. *Id.*, § 441b(a).[25]

In short, the states have ample authority under the Constitution to regulate union and corporate political contributions and expenditures as is necessary to further the compelling governmental interest in protecting the integrity of the electoral process by "[p]reventing corruption or the appearance of corruption," *Austin*, 494 U.S. at 658, and that conclusion would in no way be called into question by a judgment of this Court that Section 760 impermissibly burdens WEA's First Amendment right to speak, with whatever funds are lawfully in its treasury, on ballot measures of vital political concern to the education employees it represents.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

---

[25] Nor do statutes that regulate public-sector payroll deductions have anything to do with Section 760. A state, in administering the use of its payroll system, "is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Where that is so, "its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." *Id.*; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (upholding school district's limitation on access to internal mail system). The restrictions on speech imposed by Section 760, on the other hand, "cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property." *Consolidated Edison*, 447 U.S. at 540.

Respectfully submitted,

JUDITH A. LONNQUIST
1218 Third Avenue, Suite 1500
Seattle, WA 98101
(206) 622-2086

HARRIET STRASBERG
3136 Maringo Road SE
Olympia, WA 98501
(360) 754-0304

JOHN M. WEST
(*Counsel of Record*)
JEREMIAH A. COLLINS
LAURENCE S. GOLD
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

Counsel for Respondent

December 15, 2006

APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Washington Educational Employment Relations Act

Wash. Rev. Code § 41.59.060. Employee rights enumerated—Fees and dues, deduction from pay.

> (2) . . . If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100, except as provided in that section, the agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit.

Wash. Rev. Code § 41.59.090. Certification of exclusive bargaining representative—Scope of representation.

> The employee organization which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent all the employees within the unit without regard to membership in that bargaining representative . . . .

Wash. Rev. Code § 41.59.100. Union security provisions—Scope—Agency shop provision, collection of dues or fees.

> A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop. If any agency shop provision is agreed to, the employer shall enforce it by deducting

from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues.

Washington Fair Campaign Practices Act

Wash. Rev. Code § 42.17.020. Definitions.

(4) "Ballot proposition" means any "measure" as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency prior to its circulation for signatures.

(17) "Election" includes any primary, general, or special election for public office and any election in which a ballot proposition is submitted to the voters . . . .

(22) "Expenditure" includes a payment, contribution, subscription, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure. . . .

(38) "Political committee" means any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

Wash. Rev. Code § 42.17.610. Findings.

The people of the state of Washington find and declare that:

(1) The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate or controlling influence on the election of candidates.

(2) Rapidly increasing political campaign costs have led many candidates to raise larger percentages of money from special interests with a specific financial stake in matters before state government. This has caused the public perception that decisions of elected officials are being improperly influenced by monetary contributions.

(3) Candidates are raising less money in small contributions from individuals and more money from special interests. This has created the public perception that individuals have an insignificant role to play in the political process.

Wash. Rev. Code § 42.17.620. Intent.

By limiting campaign contributions, the people intend to:

(1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;

(2) Reduce the influence of large organizational contributors; and

(3) Restore public trust in governmental institutions and the electoral process.

Wash. Rev. Code § 42.17.760. Agency shop fees as contributions.

A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

(18)

FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 3 2007
OFFICE OF THE CLERK

No. 05-1589

IN THE

Supreme Court of the United States

GARY DAVENPORT, MARTHA LOFGREN, SUSANNAH SIMPSON, AND TRACY WOLCOTT,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

PETITIONERS' REPLY BRIEF ON THE MERITS

MILTON L. CHAPPELL
Counsel of Record
GLENN M. TAUBMAN
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 321-8510

STEVEN T. O'BAN
Ellis, Li, & McKinstry PLLC
Two Union Square
601 Union St., Suite 4900
Seattle, WA 98101-3906
(206) 682-0565

January 3, 2007

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Real Section 760 Is Subject to Scrutiny under the Deferential Rational-Basis Test Because It Places No Restrictions on the Use of Union Member Dues and Consenting Nonmember Fees 1

II. The Statutory "Dissent" Requirement for Union Members Does Not Logically Apply in the Constitutional Context to Nonmembers 4

III. It Is Not Rational to Argue That the State Constitutionally Can Prohibit, or Limit the Amount of, the Compelled Fee That Can Be Collected, but Then Cannot Condition the Use of That Same Fee . 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) ..... *passim*

Adair v. United States,
208 U.S. 161 (1908) 15

Brookhart v. Janis,
384 U.S. 1 (1966) 11, 12, 14

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) ..... *passim*

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,
527 U.S. 666 (1999) 11

Communications Workers v. Beck,
487 U.S. 735 (1988) 10

FEC v. NEA,
457 F. Supp. 1102 (D.D.C. 1978) 16

Glickman v. Wileman Brothers & Elliott, Inc.,
521 U.S. 457 (1997) 7, 13

Keller v. State Bar,
496 U.S. 1 (1990) 2

Leer v. Washington Education Association,
172 F.R.D. 439 (W.D. Wash. 1997) 6

Lehnert v. Ferris Faculty Association,
500 U.S. 507 (1991) 12

Machinists v. Street,
367 U.S. 740 (1961) ..... *passim*

TABLE OF AUTHORITIES-CONT.

Page

Machinists v. Street,
108 S.E.2d 796 (Ga. 1959) 9

Marquez v. Screen Actors Guild,
525 U.S. 33 (1998) 10

Miller v. Air Line Pilots,
108 F.3d 1415 (D.C. Cir. 1997),
aff'd, 523 U.S. 866 (1998) 13

North Carolina v. Butler,
441 U.S. 369 (1979) 12

Ohio Bell Telephone Co. v. Public Utilities Commission,
301 U.S. 292 (1937) 11

Railway Clerks v. Allen,
373 U.S. 113 (1963) ..... *passim*

Railway Employes' Department v. Hanson,
351 U.S. 225 (1956) 20

Retail Clerks v. Schermerhorn,
373 U.S. 746 (1963) 17

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 13

Thomas v. Collins,
323 U.S. 516 (1945) 15

Constitution

United States Constitution,
amend. I ..... *passim*
amend. XIV 13

TABLE OF AUTHORITIES-CONT.

Page

Statutory Provisions

National Labor Relations Act, 29 U.S.C.
§ 158(a)(3). 10

Railway Labor Act, 45 U.S.C.
§ 152, Eleventh. 10

Wash. Rev. Code Ann.
§ 41.59.100 (West 2006) 12
§ 42.17.760 (West 2006) . . . . . *passim*

ARGUMENT

I. The Real Section 760 Is Subject to Scrutiny under the Deferential Rational-Basis Test Because It Places No Restrictions on the Use of Union Member Dues and Consenting Nonmember Fees.

Respondent Washington Education Association ("WEA") in its Brief ("WEA Br.") misrepresents the trial court's judgment. WEA claims that that court forbid use of its entire general treasury, including member dues, on political advocacy. WEA Br. at 19. Nothing could be further from the truth. To effectuate Washington Revised Code § 42.17.760 ("§ 760"), the trial court ruled only that the "WEA shall return to [and in future years not collect from] all *agency fee payers who have not affirmatively authorized* . . . . the use of their fees for expenditures or contributions to influence an election or operate a political committee a percentage of the annual fees charged to the fee payer" ("§ 760 politics") representing the union's expenditures for those purposes. Joint Appendix ("J.A.") at 210-12 (emphasis added). The trial court's injunction, J.A. at 208-17, does not enjoin the collection or spending of dues from union members or consenting nonmembers. It does not enjoin the union from making any political contributions and expenditures financed by union treasury money. It merely enjoins collection and use of the § 760 political portion of a nonmember's compelled fees absent consent, consistent with the limited scope of the statute.

Thus, the injunction is similar to that which this Court suggested in *Machinists v. Street*, 367 U.S. 740 (1961), albeit for a class that included union member objectors in a union shop:

> an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from

> him as is the proportion of the union's total expenditures made for such political activities to the union's total budget.

Id. at 774-75; *accord Ry. Clerks v. Allen*, 373 U.S. 113, 122 (1963) ("and a reduction of future such exactions from him by the same proportion").

The Washington Supreme Court's claim that § 760 unduly burdens unions, *see supra* p. 1, and violates the unions' First Amendment rights is undercut by *Street*. There this Court found that a remedy similar to that required by § 760 protects both the "majority and dissenting interests in the area of political expression . . . to the maximum extent possible without undue impingement of one on the other," and "may be enforced with a minimum of administrative difficulty and with little danger of encroachment on the legitimate activities or necessary functions of the unions." 367 U.S. at 773-74 (footnote omitted).[1]

Since the conduct § 760 requires does not directly impinge on union members' political interests and imposes only a minimal administrative burden, *i.e.*, that a union ask nonmembers for permission to use their agency fees for § 760

---

[1]WEA's "heavy administrative burden" here is similar to the "extraordinary burden" found by the California Supreme Court on the State Bar in complying with *Hudson*-like procedures, which this Court rejected in *Keller v. State Bar*, 496 U.S. 1 (1990). "Since the bar already is statutorily required to submit detailed budgets to the Legislature . . . , the argument that the constitutionally mandated procedure [in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)] would create 'an extraordinary burden' for the bar is unpersuasive." *Id.* at 16. Since WEA already is constitutionally required to send each nonmember a *Hudson* notice, the argument that seeking the affirmative authorization of the nonmember is excessively burdensome is unpersuasive. "While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate." *Id.* at 16-17.

politics, as all other organizations must do, then § 760's "opt-in" requirement does not significantly burden the union's right of expressive association. The Washington Supreme Court's view that the First Amendment is violated by requiring the common courtesy of asking permission defies reason and good sense.

Therefore, the correct standard of review for § 760 is the deferential rational-basis test. WEA's lengthy discussion of strict scrutiny, WEA Br. at 19-26, is without merit. Strict scrutiny has no application to the state's withdrawal of its grant of authority to unions to compel political speech from nonmembers. Indeed, only the nonmembers are due the protection of strict scrutiny because "compel[ling] employees financially to support their collective-bargaining representative has an impact on their First Amendment interests." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977). Thus, the strict scrutiny due nonmembers requires restoring § 760 to its rightful place of protecting nonmembers' right.

WEA argues that the "restrictions imposed by Section 760 on WEA's use" of nonmembers' compelled fees are "not narrowly tailored to further any compelling governmental interest." WEA Br. at 15; *see id.* at 15-45. However, the state's *only* legitimate purpose in forcing nonmembers to pay union fees is to reimburse the union for its costs of collective bargaining, contract administration and grievance adjustment. *Abood*, 431 U.S. at 222, 232. The state also has a valid, indeed compelling, interest in ensuring that its compulsion does not exceed that limited legitimate purpose, unless nonmembers affirmatively consent to additional exactions from their wages. In other words, it is rational for the state to conclude that requiring affirmative consent furthers the legitimate state interest of ensuring that nonmembers knowingly and voluntarily contribute to the political activities of an organization they have declined to join but are compelled to support. *See infra* pp. 27-29.

II. The Statutory "Dissent" Requirement for Union Members Does Not Logically Apply in the Constitutional Context to Nonmembers.

The core of the Washington Supreme Court's error in striking down § 760 is its belief that this "Court affirmed that the burden is on the employee to make his objection known [and] to register his dissent to the union's political activities." Appendix to Petition for Certiorari in No. 05-1589 ("Pet. App.") at 14a-15a; *see id.* at 22a-24a. The court below consequently declared that "there is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers [by requiring them to opt in] than that offered under federal constitutional principles [which requires them to opt out]." *Id.* at 19a.

This ruling shows the need for this Court to clarify the meaning of the "dissent is not to be presumed" phrase first given life in *Street*, as Petitioners argue in the *Davenport* Merits Brief ("Pet. Br.") at 31-38. If this Court clarifies that it has not held that *nonmembers* must register their dissent (opt out) to a union's political activities to prevent it from spending their compelled fees on politics, such as § 760 politics, the Washington Supreme Court's decision collapses. Section 760 would not "provide more protection for nonmembers than offered under federal constitutional principles," J.A. at 19a. Instead, it would provide a statutory remedy for some of the activities nonmembers cannot constitutionally be compelled, by inaction or otherwise, to support.

The unions argue, and the Washington Supreme Court agreed, that because the WEA complied with the procedures required by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the State cannot require other procedures to protect nonmembers' First Amendment rights. However, for the reasons detailed in *Davenport* Petitioners Brief at 34-37, WEA's reliance on *Hudson* is misplaced. The scheme here –

under which fees equal to dues are collected unless a nonmember objects – is not the scheme this Court approved in *Hudson*. *See* Pet. Br. at 4-5 & n.4, 6-7, 34. Had WEA collected only the reduced fee necessary for collective bargaining, as the union claimed to have done in *Hudson*, there would be no case here because WEA would not have collected (and, therefore, could not have used) fees for politics in violation of § 760.

In *Hudson*, nonmembers were not required to object to receive a reduction from dues-equivalent fees, because the compelled fee already excluded the union's political and other nonbargaining expenditures ("proportionate fee"). Nonmembers had to "object" only if they wished to challenge the union's calculation of the proportionate fee amount and to invoke the impartial decisionmaker process. 475 U.S. at 295-96 & n.1, 306 & n.16. In contrast, WEA compels nonmembers to pay a dues-equivalent fee that includes the union's political and other nonbargaining expenditures unless the nonmember timely notifies WEA of his or her objection to paying for the union's political and other nonbargaining activities. J.A. 197-98; *accord* WEA Br. at 4.

Hudson requires that the procedures used to collect agency fees must "facilitate a nonunion employee's ability to protect his [First Amendment] rights." 475 U.S. at 307 n.20. Requiring nonmembers to object in order to pay only their proportionate share of bargaining costs does not facilitate their First Amendment right not to be compelled, by inaction or otherwise, to pay for the union's political and other nonbargaining expenditures.[2]

---

[2] WEA incorrectly claims that "the Davenport petitioners are members of a class that previously brought [challenge-to-the-calculation] litigation against WEA, and the *Hudson* procedures WEA currently employs are those prescribed in a 1998 settlement agreement that resolved that lawsuit." WEA Br. at 42 n.18. Nonmembers who had invoked WEA's

(continued...)

Moreover, once WEA recognizes that an employee is a nonmember, it not only knows that the employee does not want to associate with it at all, but it also takes affirmative steps to disassociate from the nonmember. WEA prohibits nonmembers from voting on the collective bargaining agreement, from attending union meetings, and from participating in union-provided liability insurance coverage. J.A. at 196-97; WEA Br. at 34 n.15. Thus, WEA denies nonmembers all benefits of union membership while self-servingly imposing upon them the financial obligations of supporting the political and ideological activities union members have chosen. J.A. at 151-53. At the very least, this should trigger a presumption that the nonmember's dissent *is* presumed.

A union can compel infringement upon a nonmember's constitutional rights not to associate and not to speak only by "the legislative assessment of the important contribution of the union shop to the system of labor relations," *Abood*, 431 U.S. at 222, and then only to the extent necessary for it as the exclusive bargaining representative to perform its statutory duties of collective bargaining, contract administration, and grievance adjustment, *id.* at 232. Otherwise, a nonmember's affirmative act is necessary to bring about association with the union, *i.e.*, becoming a member or waiving his or her constitutional right not to subsidize the union's politics.[3]

---

[2](...continued)
Hudson procedures by either objecting to or challenging the amount of the chargeability calculations are explicitly excluded from the *Davenport* class because the *Davenport* Petitioners did not invoke WEA's *Hudson* procedures or receive refunds. J.A. at 4-5, ¶¶ 6, 11. Moreover, neither the lawsuit nor the settlement agreement in *Leer v. Washington Educ. Ass'n*, 172 F.R.D. 439, 442-44 (W.D. Wash. 1997), questioned or changed WEA's objection requirement.

[3] WEA's contempt for nonmembers' core First Amendment rights is evident. This Court has protected those rights for more than forty-five years, since *Street*. Yet, WEA describes the nonmembers' First Amend-
(continued...)

This Court's "dissent is not to be presumed" phrase was central to and used throughout the Washington Supreme Court's decision, *see supra* p. 4, and thus is a critical issue here. Yet, WEA devotes only a footnote to this issue, WEA Br. at 41 n.17, while outsourcing the substantive response concerning "dissent" to *amici* AFL-CIO and Change to Win. *See* AFL-CIO Br. at 16-26.

Disingenuously attempting to marginalize Petitioners' argument, the unions attribute support for their conclusion that the "dissent it not to be presumed" rule "is firmly established" to the United States and the State of Washington:

> [T]he United States correctly recognizes . . . "unions may constitutionally use the fees for political purposes *unless a dissenter objects to such use.*" United States Br. at 8 (emphasis added). The State agrees: "[N]onmembers are required to object in order to claim First Amendment protection, and 'dissent is not to be presumed.'" State Br. at 29.

WEA Br. at 41 n.17; *accord* AFL-CIO Br. at 17 n.10. The unions presume too much.

The State's alleged "agreement" is contrived from a quotation of the State's characterization of the Washington

---

[4](...continued)
ment rights as merely "an exemption to which they are entitled," WEA Br. at 43, as though the nonmembers, the only parties with First Amendment rights at stake here, seek to exploit a "loophole." To the contrary, this Court described these rights as follows:

> [C]ompelled contributions for political purposes unrelated to collective bargaining implicate[] First Amendment interests because they interfere with the values lying at the "heart of the First Amendment [–] the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 472 (1997) (quoting *Abood*, 431 U.S. at 234-35).

Supreme Court's position on the "dissent" requirement, *not* a statement of its own position. Moreover, the State specifically inserted a footnote at the end of the quoted sentence to clarify that the State does *not* support the unions and the court below concerning "dissent." What the State actually said is:

> Although the Court has repeated in passing the phrase "dissent is not to be presumed" in agency fee cases, it is not clear that the Court intended this phrase to apply to nonmembers. . . . [I]n the context of an agency shop, it is reasonable to conclude that employees who have chosen to pay fees instead of join the union have, in fact, made their dissent known.

State Br. at 29 n.8; *see id.* at 29-31.

The United States' position is not as clear, but implicitly supports the nonmembers, observing that this Court's remedial objective set out in *Hudson*, 475 U.S. at 302, "protects only the union's statutory right to collect 'the cost of collective-bargaining activities,' *ibid.*; it does not provide an entitlement to some degree of windfall (generated by the laws of inertia) to cover the cost of political activities." U.S. Br. at 21. The United States also criticizes the Washington Supreme Court for "overreading" this Court's "dissent is not to be presumed" statements. *Id.*; *see also id.* at 21-22 ("those statements were premised on the relevant state of the law in *Street*").

Although the WEA limits itself to a footnote on this critical issue, the AFL-CIO goes through a lengthy, tortuous analysis of *Street*, *Allen* and *Abood*, purporting to prove that, under the facts of those cases, the "dissent is not to be presumed" phrase is a rule that applies both to union members and nonmembers.[4] AFL-CIO Br. at 17-26. The AFL-CIO's

---

[4] The AFL-CIO claims that the *Street* class "did not include any 'voluntary union members,'" and the "dissent is not to be presumed" phrase "certainly had nothing to do with 'voluntary union members,'" (continued...)

Brief so muddles the matter that it further emphasizes the need for this Court to clarify whether unions can apply a "dissent" rule to nonmembers.[5]

Significantly, the AFL-CIO utterly fails to convince that this Court should hold that a union may compel *nonmembers* to subsidize its political and other nonbargaining activities unless they dissent to such subsidization. AFL-CIO's Brief also makes several telling concessions on the "dissent" issue.

First, the AFL-CIO agrees that the "dissent" issue is decisive to the questions presented: "the requirement that 'dissent . . . must affirmatively be made known to the union by the dissenting employee' goes to the very nature of the right at issue." AFL-CIO Br. at 22.

---

[4](...continued)
apparently parsing the word "voluntary" to twist its meaning. AFL-CIO Br. at 18; *see also id.* at 22-23. Most unions consist of truly voluntary members and involuntary members who are compelled to join the union under a union-shop agreement, as in *Machinists v. Street*, 108 S.E.2d 796, 805 (Ga. 1959) (quoting stipulation of facts) (class includes employees who "'have been compelled by the union shop agreement, against their wishes, to become members of the defendant labor union organizations in order to maintain their employment'"); *see also Abood*, 431 U.S. at 212 n.2 ("[s]ome of the plaintiffs were Union members and were paying agency-shop fees under protest; . . . others had joined the Union and paid the fees without any apparent protest"). Involuntary members cannot be distinguished from voluntary members without a showing of dissent. That is why this Court said "dissent is not to be presumed" in *Street* and *Allen*, and *Abood* simply reiterated that comment because it was not challenged by the nonmembers in the latter cases. However, there is no uncertainty with nonmembers, who, by their very status, clearly are not voluntary union members and have manifested *no* indicia of support for any aspect of union activities.

[5] Several other *amici* also ask this Court to rule that nonmembers cannot be required to "dissent" to a union's political and nonbargaining expenditures in order to escape compelled subsidization of those activities. *See* Ass'n of Am. Educators Br. at 3-4; Cato Inst. Br. at 5-6, 8-17; Inst. for Justice Br. at 3, 17-20; Mackinac Ctr. for Pub. Policy Br. at 2, 5-6, 10-22; Pac. Legal Found. Br. at 2, 13-23.

Second, the AFL-CIO concedes, as it must, that the "dissent is not to be presumed" standard arose from statutory construction, not constitutional interpretation:

> Because "*the safeguards of § 2 Eleventh* [of the Railway Labor Act, 45 U.S.C. § 152, Eleventh,] were added for the protection of dissenters' interests," the Court made clear that any remedies *under that section* "would be properly granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." *It was in this regard* that the Court emphasized that "dissent is not to be presumed."

Id. at 22-23 (quoting *Street*, 367 U.S. at 764) (emphasis added, citation omitted).[6]

---

[6] *Marquez v. Screen Actors Guild* does not help the AFL-CIO's argument, because that case also involved statutory interpretation. The full quotation, truncated by the AFL-CIO Brief at 17, is that "§ 8(a)(3) [of the National Labor Relations Act, 29 U.S.C. § 158(a)(3),] allows unions to collect and expend funds over the objection of nonmembers only to the extent they are used for collective bargaining, contract administration, and grievance adjustment activities." 525 U.S. 33, 36 (1998) (citing *Communications Workers v. Beck*, 487 U.S. 735 (1988)). That says nothing about whether nonmembers must object to pay only the bargaining costs. In fact, later the *Marquez* Court seems to assume that nonmembers do *not* have to dissent:

> [in] *Beck*, we considered whether the employee's "financial core" obligation included a duty to pay for support of union activities beyond those activities undertaken by the union as the exclusive bargaining representative. We held that the language of § 8(a)(3) does not permit unions to exact dues or fees from employees for activities that are not germane to collective bargaining, grievance adjustment, or contract administration. As a result . . . , § 8(a)(3) permits unions and employers to require only that employees pay the fees and dues necessary to support the union's activities as the employees' exclusive bargaining representative.

Id. at 37-38 (citations omitted).

Third, the AFL-CIO admits that "the *Abood* Court closely followed *Street* and *Allen*, expressly endorsing their basic proposition that 'dissent is not to be presumed.'" AFL-CIO Br. at 24. In other words, *Abood* did not give consideration to whether the statutory dissent requirement logically applies in the constitutional context.

In mechanically adopting the statutory "dissent" notion, *Abood* did not consider that, where First Amendment rights are at issue, as they were for the very first time in *Abood*, a strong presumption *against* waiver obtains. In such cases, "for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment of a known right or privilege.'" *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). In other words, where constitutional rights are at issue, dissent to their surrender *is* to be presumed, until the opposite is clearly established.[7] This would further the long-standing rule that courts "'do not presume acquiescence in the loss of fundamental rights.'" *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n*, 301 U.S. 292, 307 (1937).

That is particularly true here, as a matter of logic. By either resigning from or declining to join the union in the first

---

[7] Justice Powell's concurring opinion in *Abood*, joined by Chief Justice Burger and Justice Blackmun, states that it would be unconstitutional to require affirmative dissent by a nonmember.

> [C]ompell[ing public employees] to pay full union dues to a union with which they disagree, subject only to a possible rebate or deduction if they are willing to step forward, [and] declare their opposition to the union . . . [is] a sweeping limitation of First Amendment rights [that] is not only unnecessary on this record; it is in my view unsupported by either precedent or reason.

431 U.S. at 245. In addition, Justice Stevens made it clear that he did not read the majority's discussion of the remedies in *Street* and *Allen* to mean that those statutory remedies "would necessarily be adequate in this [constitutional] case or in any other case." *Id.* at 244 (concurring opinion).

place, nonmembers have already exercised their First Amendment rights not to associate and not to speak. They cannot be deemed by silence to have consented to a deduction from their wages greater than that justified by the state interest in elimination of "free riders" on a union's bargaining activities. Here, spending on § 760 politics cannot constitutionally be justified by that interest. *Abood*, 431 U.S. at 232-36; *see Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519-22 (1991). Accordingly, the union's collection and use of such political moneys presents a core First Amendment problem and must trigger the *Brookhart* presumption against waiver of constitutional rights.[8]

Because First Amendment rights are at issue in every public-sector agency fee case, a presumption of waiver of those rights cannot be entertained under the slogan "dissent is not to be presumed" or otherwise. Neither *Abood* nor any nonmember union fee case following it addressed this issue. Thus, this Court must now articulate which rule prevails – *Brookhart*'s *constitutional* rule or the *statutory* rule of *Street* and *Allen*, as uncritically repeated in *Abood*.

In arguing that "nonmembers must affirmatively state their dissent in order to be entitled to restrict the union's use

---

[8] This Court's jurisprudence regarding waiver of fundamental constitutional rights requires a two-pronged test. A waiver may be found only when (1) the failure to assert a known right is coupled with (2) a course of conduct consistent with waiver. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). Here a waiver can never be found without affirmative consent, because the dues equivalent fees are automatically deducted by the school district, Wash. Rev. Code § 41.59.100; *see* J.A. at 34. Thus, the second prong of the waiver analysis, *conduct*, cannot be satisfied. As this Court has recognized, "mere silence is not enough," "actions and words" are required. *Butler*, 441 U.S. at 373. The Washington Supreme Court also determined that affirmative authorization or consent requires "more than a nonresponse to a *Hudson* packet." Pet. Ap. at 11a. Consent means saying "'yes,' instead of failing to say 'no.'" *Id.* at 9a. Yet, WEA takes the nonmembers' silence or failure to object within 30 days as a "waive[r of their] ability to object." J.A. at 198.

of their agency fee payments," AFL-CIO Br. at 19, the unions wrongly suggest that the nonmember's right to be free from compelled speech – the right to refrain from political speech and association, *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) – does not survive the government's imposition of a dues equivalent fee requirement. Under this Court's First and Fourteenth Amendment jurisprudence, a nonmember's pre-existing right to refrain from supporting a union's political, ideological, and nonbargaining activities cannot be burdened further by requiring the nonmember to affirmatively object each year to supporting those activities.[9] By definition, a nonmember has already refrained from or refused to support *any* of the union's activities. The First Amendment cannot allow mere government fiat to countenance burdening the exercise of the right to be free from compelled association – even to the extent of requiring nonmembers to voice an objection. "[T]he requirement of disagreement finds no legal warrant in our compelled-speech cases." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 488 (1997) (Souter, J., dissenting).

---

[9] To presume that the nonmember, who has never authorized the union to speak for him or her on political, ideological, and nonbargaining matters (and indeed, has not even authorized the union to speak on collective bargaining matters, that authority being derived from statute), assents to association for politics just because the union provided him or her with a *Hudson* notice is utterly absurd and without evidentiary or rational basis, notwithstanding AFL-CIO's attempts to suggest otherwise, AFL-CIO Br. at 25-26. *Abood* recognizes that there are "government employees who object to public-sector unions as such," 431 U.S. at 211, or to "activities undertaken by the union in its role as exclusive representative," *id.* at 222. *See also Glickman*, 521 U.S. at 472 ("employees who objected to unions"); *Miller v. Air Line Pilots*, 108 F.3d 1415, 1422 (D.C. Cir. 1997) (Silberman, J.) ("it would certainly not be unexpected that pilots would have varying views as to the desirability of government regulation – including those regulations of airlines that pertain to safety"), *aff'd on other grounds*, 523 U.S. 866 (1998).

Even assuming *arguendo* that the "dissent is not to be presumed" notion can rightly be applied to nonmembers where First Amendment rights are at stake, which the nonmembers' previous analysis and the analysis set out in Petitioners' Brief at 31-38 confutes, nothing precludes a state from explicitly adopting the very opposite presumption in an agency fee scheme. As WEA itself concedes, "a state is of course free . . . to 'provide greater protection to its citizens' than the federal Constitution demands." WEA Br. at 42 n.19.

The state certainly has the plenary power to apply the *Brookhart* rule by statute to nonmembers' compelled fees because it could outlaw all collection of such fees. That is plainly an acceptable view of what § 760 does – requires that the nonmember's "intentional relinquishment of a known right or privilege" be "clearly established" by the employee's affirmative authorization. Another view is that the state may also "dissent" or "object" for nonmembers and restrict a union's collection and use of compelled fees, as § 760 does. Either way, the state is not tied to the judicial construct that "dissent is not to be presumed," but instead, can mandate that nonmembers possess a rebuttable presumption of dissent to a union's § 760 politics.[10]

WEA notes that inertia can also mean that supporters of politics will fail to give their authorization to causes like smaller class size with which they agree. WEA Br. at 43 & n.20. Even if "inertia" could work both ways, the state can determine how it wants to set the default. Why is it right for the union to set the default in a way that favors it and maxi-

---

[10] That this Court believed that "dissent is not to be presumed" in situations in which the statute *sub judice* says nothing about "dissent" or where the statute arguably requires "dissent" does not mean that a state cannot explicitly include in its agency fee scheme a presumption of dissent against union politics that can be overcome only by a nonmember's affirmative authorization of the union's use of those fees on § 760 politics.

mizes its political viewpoint,[11] but wrong for the state to re-set it in a way that fosters more voluntary choice and assures that group political speech reflects the actual interests of the individuals that support the group? Essentially, WEA argues its "First Amendment rights" dictate to states what the default setting must be. Yet, contradictorily, WEA concedes it has no First Amendment right that prevents states from prohibiting collection of compelled fees, in full or in part, from nonmembers in the first place. WEA Br. at 20.

III. It Is Not Rational to Argue That the State Constitutionally Can Prohibit, or Limit the Amount of, the Compelled Fee That Can Be Collected, but Then Cannot Condition the Use of That Same Fee.

The issue here is not the union's right "to use funds lawfully in its possession for political speech." WEA Br. at i; *accord* AFL-CIO Br. at 14. If that were the case, *Abood*, 431 U.S. at 234, 235-36, would not have held that a union cannot use or collect objectors' fees for politics, because unions in Michigan could under the statute at issue there lawfully collect from nonmembers fees equal to full dues and spend them for politics, *id.* at 232.

The issue here is whether a state may condition the use of nonmember fees for political purposes upon actual and demonstrable consent. WEA admits the state could, consistent with the Constitution, refuse to authorize compelled fees entirely or only authorize them partially, WEA Br. at 19, 20, 46-49. WEA even agrees that:

---

[11] "'I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ.'" *Abood*, 431 U.S. at 225 n.20 (quoting *Adair v. United States*, 208 U.S. 161, 191 (1908) (Holmes, J., dissenting)). "[E]spousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause." *Thomas v. Collins*, 323 U.S. 516, 538 (1945); *see also id.* at 532.

> a state has ample authority consistent with the First Amendment, to design an agency fee system for its public sector that ensures that no nonmember who pays an agency fee – whether or not an "objector" – will be required to support a union's political and other expenditures not germane to collective bargaining.

WEA Br. at 47; *accord id.* at 19. Because § 760 does not go even that far – allowing nonmembers to affirmatively authorize a union to spend their compelled fees for partisan politics – one cannot take seriously the arguments of the unions and the Washington Supreme Court that § 760 is unconstitutional.[12]

The rub according to WEA is that Washington chose in § 760 to restrict a union's right to use nonmember agency fees, rather than to restrict the collection of those fees for politics in the first place. It is not rational or logical to argue that the state can prohibit, or limit the amount of, the compelled fee that can be collected, but cannot condition the use of the fee. That is precisely what the unions irrationally urge. But without state authorization, WEA could not collect fees from nonmembers in the first place.[13] It follows that the state may condition its grant of authority as it has in § 760.

This Court has repeatedly held that the appropriate remedy for a statutory or constitutional prohibition on the use

---

[12] WEA complains that § 760 "provides for hyper-vigilance on behalf of union nonmember fee payers who have not exercised their independent right to object to the union's electoral spending." WEA Br. at 32. However, § 760 provides less "vigilance" than would a Right to Work law or a "fee for collective bargaining only" statute.

[13] Apparently, the unions would have a hard time collecting dues from members without the state's help. "'[I]t is well recognized that if you take away the mechanism of payroll deduction you won't collect a penny from these people.'" *FEC v. NEA*, 457 F. Supp. 1102, 1109 (D.D.C. 1978) (quoting then NEA General Counsel, Robert H. Chanin, discussing dues payments by union members.)

of compelled union fees is an injunction against the collection of that part of the fees that would be used for prohibited purposes. In *Abood*, this Court found "meritorious" the employees' argument "that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." 431 U.S. at 234.

Moreover, in deciding the appropriate remedy to prevent *use* of the compelled dues and fees on politics, *Abood* held that "[i]t is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to collective-bargaining purposes."[14] *Id.* at 237 n.35. Instead, the appropriate remedy to prevent misuse requires: "(1) the refund of a portion of the exacted funds in the proportion that union political expenditures bear to total union expenditures, and (2) the reduction of future exactions by the same proportion." *Id.* at 240. This is precisely the injunction the trial court issued to enforce § 760. J.A. at 212.

In other words, a statutory restriction on the use of compelled fees is necessarily a prohibition on collection for the restricted purposes, because a restriction on use can only be achieved by prohibiting collection of the restricted part of the fees. The difference between statutes prohibiting "use" and statutes prohibiting "collection" is a difference without a distinction. Accordingly, § 760's prohibition on use is necessarily a prohibition on collection. Being prohibited from

---

[14] The Court based this holding on its conclusion in *Retail Clerks v. Schermerhorn* that any limitation only on use of nonmembers' dollars "is of bookkeeping significance only rather than a matter of real substance," because, if "nonmember payments [are] equal to those of a member," the nonmember would still subsidize the union's political activities. 373 U.S. 746, 753-54 (1963) (quoted in *Abood*, 431 U.S. at 237 n.35). The trial court and the State's expert witness, economist and CPA Jeffrey L. Baliban, thus properly relied on this principle. *See* J.A. at 17-19, 130-39.

collecting the § 760 political part of nonmember fees for which it does not have affirmative authorization, WEA cannot claim "lawful possession" of that portion of the fees.

Nevertheless, both WEA and the AFL-CIO rest their case on the notion that § 760 somehow improperly infringes on the use of the union's "general treasury funds." WEA Br. at 1, 16, 19; AFL-CIO Br. at 5, 11. For example, they complain: "the statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech." WEA Br. at 13-14. However, not every possession permits every use. There are many situations, through contract, will, deed, attorney trust accounts, statute, or other legal means, in which an encumbrance is placed on the use of moneys as a condition that allows for their initial collection and possession.[15] The mere collection and possession by themselves do not allow unfettered use determined at the will of the possessor. Instead, collection and possession of encumbered moneys constitute evidence of acquiescence in the encumbrance by the possessor.

Here, WEA collects dues-equivalent fees from nonmembers knowing, and subject to, § 760's affirmative authorization command. There are not two distinct steps – the collection of fees equal to 100% of dues, *and only thereafter* a statutory limitation on their use. There is only collection, and subsequent possession, of moneys which the union intends to expend on political activism, but which are statutorily encumbered *from the very beginning* as to that use absent nonmembers' affirmative authorization. In operation, the agency-shop statute and § 760 are not separate and independent, but together form an integrated whole that prohibits collection of the § 760 political portion from nonmembers who have not affirmatively authorized such political use.

---

[15] WEA and the Washington Supreme Court admit that § 760 encumbers the fees. WEA Br. at 13, 15, 16, 19, 21, 25; Pet. App. at 26a.

The legal status of such encumbered moneys distinguishes them from and disqualifies them for a union's "general treasury funds," because the union cannot put them to the use for which it collected them without the prior approval of the third party nonmembers. Indeed, in prudence, such moneys should not be commingled with the other moneys over which the union has discretion to spend as it sees fit. It was the union's ill-advised decision to commingle the political moneys in its general treasury, WEA Br. at 9-11, that led the trial court to find that WEA violated § 760.[16] Arguing that § 760 is unconstitutional because the union cannot be barred from using funds that it commingled, WEA Br. at 25-26, is like a thief arguing that he cannot make restitution because the stolen dollars in his pocket have been commingled with other dollars that were lawfully his.

A union never acquires a First Amendment right to use nonmember fees for its own political speech solely as a consequence of the mere collection of those fees. Section 760 makes such use contingent upon the nonmember's prior approval. WEA's First Amendment right, if it arises at all, depends upon and derives from the prior exercise of the nonmember's First Amendment right to permit his or her moneys to be so employed. For that reason alone, all the convoluted First Amendment analyses of WEA and the AFL-CIO are misplaced and irrelevant.

The *only* First Amendment right in this case is that of nonmembers to refrain from subsidizing the union's political activism. Under § 760 workers may waive this right by

---

[16] "Any distinction between 'collecting' an[] agency fee (on the revenue side) and 'expending' monies for a particular purpose (on the expenses side) [is] forever obscured when the funds collected are 'commingled' into the general fund." J.A. at 17; *see also* testimony of CPA Baliban, *id.* at 135-39 ("You could use the general fund for anything you wanted to use [it for] so long as you didn't commingle the funds and you don't have fee payer money in there without affirmative authorization.") *Id.* at 139.

affirmatively authorizing such expenditures. If and when they do – but not before – the union acquires a privilege to use those moneys as part of its "general fund," and a First Amendment right not to have the state abridge such use. But, because § 760 operates only to require a voluntary waiver of nonmembers' First Amendment rights, which waiver facilitates the union's use of moneys to which it would never have any other entitlement pursuant to the agency fee scheme, § 760 actually *advances* the union's First Amendment rights. Therefore, the Washington Supreme Court erroneously deemed that § 760 abridged the union's First Amendment rights.

CONCLUSION

This Court should remind the Washington Supreme Court that: "[t]he ingredients of industrial peace and labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. *The decision rests with the policy makers, not with the judiciary.*" *Abood*, 431 U.S. at 225 n.20 (quoting *Ry. Employes' Dep't v. Hanson*, 351 U.S. 225, 233-34 (1956)) (emphasis added).

Accordingly, the judgment below should be reversed on both Questions Presented and remanded as requested in Petitioners' Brief at 22-23, 31, 37-38, 40, 45-46.

Respectfully submitted,
MILTON L. CHAPPELL
Counsel of Record
GLENN M. TAUBMAN
National Right to Work Legal Defense Foundation, Inc.
STEVEN T. O'BAN
Ellis, Li & McKinstry PLLC

COUNSEL FOR PETITIONERS

January 3, 2007

665

NOV

Nos. 05-1657 & 05-1589

In the Supreme Court of the United States

STATE OF WASHINGTON, PETITIONER

v.

WASHINGTON EDUCATION ASSOCIATION

GARY DAVENPORT, ET AL., PETITIONERS

v.

WASHINGTON EDUCATION ASSOCIATION

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

STEVE N. HAJJAR
Attorney
Federal Election Commission
Washington, D.C. 20463

HOWARD M. RADZELY
Solicitor

KATHERINE E. BISSELL
Associate Solicitor

NORA CARROLL
Senior Attorney
Department of Labor
Washington, D.C. 20210

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

DOUGLAS N. LETTER
AUGUST E. FLENTJE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under Washington law, a labor organization "may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." Wash. Rev. Code Ann. § 42.17.760 (West 2006). The question presented is whether such an affirmative-authorization or opt-in requirement violates the First Amendment rights of labor organizations.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument 9
I. Washington's affirmative-authorization requirement promotes the legitimate First Amendment interests of nonmembers and the integrity of the election process 10
II. The affirmative-authorization requirement does not abridge freedom of speech or association, but instead promotes it 13
A. The Washington law does not infringe union members' freedom of speech or association 14
B. The administrative cost of obtaining nonmembers' authorization is not an unconstitutional burden 16
C. The constitutional floor for protecting nonmembers' First Amendment rights is not also a constitutional ceiling on such protections 20
III. This Court's campaign-finance decisions underscore the constitutionality of the affirmative-authorization requirement 23
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Abood v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) 10, 11, 21
Austin v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) 27

Cases—Continued: Page

Boy Scouts of Am. v. *Dale*, 530 U.S. 640 (2000) ... 5, 18, 19
Buckley v. *Valeo*, 424 U.S. 1 (1976) 22
Chicago Teachers Union, Local No. 1 v. *Hudson*, 475 U.S. 292 (1986) 2, 10, 11, 17, 20, 21
Ellis v. *Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984) 10, 12, 17
FEC v. *Beaumont*, 539 U.S. 146 (2003) 26, 28
FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982) 13, 26, 29
First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 30
Healy v. *James*, 408 U.S. 169 (1972) 17
International Ass'n of Machinists v. *Street*, 367 U.S. 740 (1961) 11, 21, 22
Keller v. *State Bar*, 496 U.S. 1 (1990) 21
Lehnert v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991) 10, 11
Lincoln Fed. Labor Union v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) 10
Lyng v. *International Union*, 485 U.S. 360 (1988) 18
McConnell v. *FEC*, 540 U.S. 93 (2003) 27, 28, 29
Michigan State AFL-CIO v. *Miller*, 103 F.3d 1240 (6th Cir. 1997) 13
NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958) 17
NLRB v. *General Motors Corp.*, 373 U.S. 734 (1963) ... 11
Pipefitters Local Union No. 562 v. *United States*, 407 U.S. 385 (1972) 26
Railway Employees' Dep't v. *Hanson*, 351 U.S. 225 (1956) 2, 10

Cases—Continued: Page

Regan v. *Taxation with Representation*, 461 U.S. 540 (1983) 22
Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) .. 16
Rumsfeld v. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006) 15, 19
United States v. *O'Brien*, 391 U.S. 367 (1968) 14

Constitution, statutes and regulations:

U.S. Const. Amend. I ..... *passim*
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* 23
2 U.S.C. 441b (2000 & Supp. IV 2004) 1, 25, 26
2 U.S.C. 441b(a) 23
2 U.S.C. 441b(b)(2) (Supp. IV 2004) 23
2 U.S.C. 441b(b)(3)(A) 24
2 U.S.C. 441b(b)(3)(B) 24
2 U.S.C. 441b(b)(3)(C) 24
2 U.S.C. 441b(b)(4)(A)(ii) 24
2 U.S.C. 441b(b)(4)(B) 24
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 11
29 U.S.C. 158(a)(3) 11
29 U.S.C. 164(b) 11
5 U.S.C. 7102 12
29 U.S.C. 551 2
Wash. Rev. Code Ann. (West 2006):
§ 41.56.122(1) 2, 12, 14
§ 41.59.100 ..... 2, 12, 14

Statutes and regulations: Page

§ 42.17.030 25

§ 42.17.760 ..... 3, 4, 12

11 C.F.R. Pt. 114:

Section 114.5(a)(1) 24

Section 114.5(k)(1) 25

Section 114.6(a) 24

Section 114.6(c) 24

Section 114.6(d) 24

Section 114.6(e)(1) 25

Miscellaneous:

FEC Advisory Opinion 2001-04, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6360 25

Employment Standards Admin., U.S. Dep't of Labor, *State Right-to-work Laws* (last modified Dec. 2005)<http://www.dol.gov/esa/programs/whd/state/righttowork.htm> 11

In the Supreme Court of the United States

No. 05-1657

STATE OF WASHINGTON, PETITIONER

v.

WASHINGTON EDUCATION ASSOCIATION

No. 05-1589

GARY DAVENPORT, ET AL., PETITIONERS

v.

WASHINGTON EDUCATION ASSOCIATION

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents a First Amendment challenge to a state law that requires labor unions to obtain the permission of nonmembers before using compelled agency shop fees to make contributions or expenditures to influence elections. The United States has a substantial interest in the validity of such a provision. The Federal Election Commission is charged with enforcing federal election laws, including laws that generally prohibit unions from using nonmembers' agency shop fees for political activities. 2 U.S.C. 441b (2000 & Supp. IV 2004). In addition, the Secretary of Labor is responsible for help-

ing "to foster, promote, and develop the welfare of the wage earners of the United States." 29 U.S.C. 551.

STATEMENT

1. States have the flexibility to permit or prohibit "union shop" and "agency shop" arrangements in the workplace. See *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225, 233, 238 (1956). Under a "union shop" arrangement, a union and employer enter into a collective bargaining agreement that requires all employees who benefit from collective bargaining to join the union. By contrast, under an "agency shop" agreement, employees do not have to join the union, but must nonetheless pay an "agency shop" fee to the union for representational activities. Even when a union-shop or agency-shop arrangement is permitted, workers have a right to a refund of the portion of their fees or dues that would otherwise subsidize a union's political activities. *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 301-302, 310 (1986).

Washington State generally forbids public-sector employers and unions from entering into union-shop arrangements, but it has chosen to permit agency-shop agreements under which employees who do not join the union must pay the union a fee equal to the dues paid by members. *E.g.*, Wash. Rev. Code Ann. §§ 41.56.122(1), 41.59.100 (West 2006). Under Washington law, if a public education employer enters into such an agency-shop agreement, it must deduct union dues and agency shop fees from its employees' paychecks. *Id.* § 41.59.100.

The Washington statute at issue in this case further provides, however, that "[a] labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or

expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." Wash. Rev. Code Ann. § 42.17.760 (West 2006). Washington voters approved that opt-in requirement in 1992 as part of an omnibus campaign-finance ballot initiative. 05-1657 Pet. App. 8a.

2. Respondent Washington Education Association (WEA) is the bargaining representative for approximately 70,000 Washington teachers and other educational employees. 05-1657 Pet. App. 3a. Under its collective bargaining agreement, the WEA collects agency shop fees from nonmembers, *i.e.*, employees who chose not to join the union. *Id.* at 3a. Nonmembers comprise approximately 5% of the bargaining unit. *Id.* at 4a. The union uses a portion of each worker's fees for political purposes unless the worker affirmatively objects to that use—or opts *out* of the union's political funding scheme—in which case the employee may obtain a rebate of the relevant portion of the fees. See *id.* at 3a-5a.

3. Petitioner State of Washington filed suit against WEA in state court, alleging that for five years the union had used nonmembers' agency shop fees for political purposes without their affirmative authorization, in violation of Section 42.17.760. 05-1657 Pet. App. 5a. After finding that WEA had done so, the trial court fined WEA $400,000, required the union to pay the State's costs and fees, and entered permanent injunctive relief. *Id.* at 81a-83a, 84a-91a. The Washington Court of Appeals reversed. *Id.* at 48a-78a. It concluded that the affirmative-authorization requirement "unduly burdens unions" by "requir[ing] a union to protect nonmembers who disagree with a union's political expenditures but are unwilling to voice their objections." *Id.* at 68a, 69a.

In the meantime, the *Davenport* petitioners—public educators in Washington who are not members of WEA, but are covered by the agency-shop agreement—filed a class action seeking recovery of the portion of their agency shop fees that the union had used for political purposes. 05-1657 Pet. App. 7a. The trial court declined to dismiss the complaint, but stayed further proceedings pending interlocutory appeal. 05-1589 Pet. App. 45a-49a. After the court of appeals held the affirmative-authorization requirement unconstitutional in the enforcement action discussed above, it remanded the *Davenport* case to the trial court for dismissal. *Id.* at 42a-44a.

4. The Supreme Court of Washington consolidated the two cases and affirmed the court of appeals' ruling that the State's affirmative-authorization requirement is unconstitutional. 05-1657 Pet. App. 1a-47a.

a. The court first interpreted Section 42.17.760 to require an "expression of positive authorization" before a union may use a worker's agency shop fees for political purposes. 05-1657 Pet. App. 10a. That is, the court observed, the statute requires "that the member must say 'yes,' instead of failing to say 'no.'" *Ibid.* The court also agreed with the State that such authorization need not be in writing. *Id.* at 11a.

The court then concluded that, because "[r]egulation of First Amendment rights is always subject to exacting judicial scrutiny," the Washington law was subject to strict scrutiny. 05-1657 Pet. App. 18a. Applying that analysis, the court held that the Washington law creates a "presumption of dissent" that "violates the First Amendment rights of both members and nonmembers." *Id.* at 19a. The court explained that the affirmative-authorization requirement unconstitutionally "transfers the burden of asserting First Amendment rights from

the dissenting nonmembers and places it on the supporting nonmembers and the union." *Id.* at 22a. In the court's view, "[d]issenters may not silence the majority by the creation of too heavy an administrative burden," and here "the State's position would require individual contact with each nonmember who did not respond to" a mailing. *Id.* at 20a. The court went on to hold that the Washington law violated "the First Amendment rights of nonmembers as well," because nonmembers may agree with the union's political activities. *Ibid.*

The court reasoned that its conclusion was required by *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000). 05-1657 Pet. App. 27a-34a. It construed *Dale* to hold that if a law applies to an organization that engages in expressive activity, and "significantly burdens the [organization's] ability to express its viewpoint," the law must be narrowly tailored. *Id.* at 29a-30a; see *id.* at 27a-28a. Giving "deference to the union's view of what would impair its political expression," *id.* at 32a, the court concluded that Washington's opt-in requirement significantly burdens the union's expression, *id.* at 31a-32a. It also held that the requirement is not narrowly tailored because it gives nonmembers greater protection than the Constitution requires. *Id.* at 27a-28a, 32a-33a.

b. Three Justices dissented. 05-1657 Pet. App. 34a-47a. In their view, "the majority turns the First Amendment on its head to invalidate a state statute enacted to further protect the constitutional rights of nonunion members who are required to pay agency fees as the price of their employment." *Id.* at 37a. They explained that, particularly since States may "eliminate the payroll deduction for collection of agency shop fees altogether," "there is no constitutional right to have the government deduct union dues (and, by logical extension,

agency dues) from paychecks." *Id.* at 38a-39a. Indeed, the dissenters explained, the law at issue simply places "a procedural condition on the collection of a small portion of such shop fees," namely, those that would be used by the union for political activities. *Id.* at 39a.

The dissenters also reasoned that the majority's reliance on this Court's cases was misplaced. As they explained, "[t]he holdings of all the cases cited by the majority amount to a simple proposition: the constitution requires *at least* an opt-out scheme to protect dissenters' rights." 05-1657 Pet. App. 41a. Those cases do not, the dissenters continued, "stand for the proposition that the constitution limits a different legislative approach to protecting dissenters' rights, including an opt-in scheme." *Ibid.* The dissent also disavowed the majority's reliance on *Dale*, explaining that here, unlike *Dale*, "nonunion employees have elected *not* to associate" with the union. *Id.* at 45a. "This does not violate the associational rights of the union or its members," the dissenters explained, because the union has "no constitutional right to compel membership much less monetary support from nonmembers in the first place." *Ibid.*

SUMMARY OF ARGUMENT

The First Amendment does not prevent a State from establishing an opt-in requirement for use of nonmembers' agency shop fees for political purposes. The decision below went far astray and interpreted a statute that furthers First Amendment values as violating the Amendment. That decision has far-reaching consequences and should be reversed.

I. The opt-in provision at issue in this case requires only that unions obtain nonmembers' consent before using their compelled agency shop fees for political pur-

poses. That requirement—the simple proviso that a "member must say 'yes,' instead of failing to say 'no,'" 05-1657 Pet. App. 10a—not only fails to raise any constitutional concern, but actually promotes First Amendment interests by protecting the freedom of speech and association of workers who chose *not* to join the union and may well oppose its political activities. The First Amendment requires that those workers be given an opportunity to "opt out"; and those same values are furthered, not threatened, by requiring that they affirmatively "opt in." In addition, such an affirmative-authorization requirement protects all participants in the political process from the distorting effects that result from permitting a speaker to amplify its voice with the money of others who do not actually support its message.

II. Far from abridging unions' freedom of speech, Washington's opt-in requirement leaves unions free to speak on any topic of their choosing, at any time or place, and in any manner. Nor does it restrict the amount of money unions can raise or spend on speech. The requirement certainly does not abridge union members' freedom of association, because union members remain free to associate and pool their (own) funds, to determine the content of their shared message and the means of communicating it, and to organize their internal affairs as they see fit. It simply requires a union to obtain nonmembers' affirmative consent before using their coercively collected fees for political purposes.

Nor do the administrative costs of securing nonmembers' consent unconstitutionally burden unions' First Amendment rights. The costs of requesting affirmative authorization are relatively modest—a mailing or perhaps a phone call—and are likely *less* than the costs faced by every other organization that seeks to use

other peoples' money for speech. While other organizations must solicit and collect donations without the government's assistance, Washington gives unions a significant advantage by (i) permitting them to impose agency shop fees on nonmembers and use those fees for political purposes (with nonmembers' affirmative authorization), and (ii) collecting those fees for the unions through payroll deductions. The union has no constitutional entitlement to additional advantages. And, of course, the unions face no possibility of suffering any net harm—if the costs of obtaining affirmative consent outweigh the funds generated, the unions can simply not pursue consent. But they lack any *a priori* entitlement to those funds and therefore can state no claim to constitutional injury from burdens on their ability to collect them.

In situations where Congress or a state legislature has given unions a statutory right to enter into collective bargaining agreements permitting unions to collect and use agency shop fees, this Court has held that unions may constitutionally use the fees for political purposes unless a dissenter objects to such use. But nothing in this Court's precedents suggests that the government may not insist that nonmembers affirmatively consent to the use of their dues for political purposes. The Washington Supreme Court fundamentally erred by treating the constitutionally required procedures for *protecting* dissenters' rights as a constitutional ceiling, rather than a floor, on the protections the government may afford individuals who decline to join a union.

III. The constitutionality of Washington's affirmative-authorization requirement is underscored by this Court's decisions upholding campaign-finance laws that impose *more* burdensome requirements on unions. Under federal law, unions generally may not finance fed-

eral political activities with general treasury funds derived from nonmembers' fees, or even from members' dues, regardless of whether the member or nonmember would consent to that use. Instead, unions must: establish separate segregated funds; solicit separate voluntary contributions to those funds; and observe strict limits on their solicitation of contributions from nonmembers. Because the constitutionality of those federal restrictions is well-settled, it follows *a fortiori* that Washington's more modest affirmative-authorization requirement is constitutional as well.

ARGUMENT

This Court long ago established that the First Amendment prohibits unions from using for political purposes fees collected under a state-imposed union-shop or agency-shop arrangement from nonmembers who object to the union's political activities. In many States, that constitutional prohibition is given effect by permitting nonmembers to opt out of any regime in which their dues are used for political purposes. The basic question in this case is whether the Constitution prohibits a State from imposing an opt-*in* requirement that prevents a union from using nonmembers' fees for political purposes unless workers affirmatively authorize it. The answer is clearly no. Far from violating the First Amendment, such a requirement actually advances First Amendment values by safeguarding the interests of nonmembers in not having to pay for union political activities with which they disagree. The added protections afforded nonmembers in no way intrude on the First Amendment interests of unions. Indeed, unions have no First Amendment interest at all in using nonmembers' dues for political activities with which they disagree.

I. WASHINGTON'S AFFIRMATIVE-AUTHORIZATION REQUIREMENT PROMOTES THE LEGITIMATE FIRST AMENDMENT INTERESTS OF NONMEMBERS AND THE INTEGRITY OF THE ELECTION PROCESS

A. Union-shop and agency-shop arrangements directly impact the First Amendment interests of workers who are compelled by state law to pay dues or fees to the union. As this Court has recognized, because "[u]nions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints," *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991), "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). In order to further the government's interest in labor peace, the government may nonetheless authorize union-shop or agency-shop arrangements. *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225, 233-235 (1956). But as this Court has emphasized, "allowing the union shop at all" is "a significant impingement on First Amendment rights." *Ellis* v. *Brotherhood of Ry. Clerks*, 466 U.S. 435, 455-456 (1984); see *Chicago Teachers Union* v. *Hudson, Local No. 1*, 475 U.S. 292, 301 (1986); *Abood*, 431 U.S. at 222. As a result, "[t]here can be no doubt that it is within the police power of a State to prohibit the union * * * shop." *Hanson*, 351 U.S. at 233; accord *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 531 (1949).

If the government authorizes a union or agency shop, employees may be required to pay only their fair share of "the work of the union in the realm of collective bargaining," work from which all employees benefit. *Hanson*, 351 U.S. at 235. The First Amendment prohibits

the government from requiring workers to support a union's political activities over their objection. *Hudson*, 475 U.S. at 301-302; *Abood*, 431 U.S. at 234. Thus, union- or agency-shop fees "must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519.[1]

B. The federal and state governments have adopted various approaches to balancing their interest in promoting labor peace with their interest in protecting workers who would prefer not to associate with a union. The National Labor Relations Act, 29 U.S.C. 151 *et seq.*, generally authorizes private-sector employers and unions to enter into union-shop or agency-shop agreements, 29 U.S.C. 158(a)(3), but also permits States to ban such arrangements, 29 U.S.C. 164(b). See *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742-744 (1963). Approximately half of the States have enacted "right-to-work" laws restricting or prohibiting private-sector union or agency shops. See Employment Standards Admin., U.S. Dep't of Labor, *State Right-to-work Laws* (last modified Dec. 2005) <http://www.dol.gov/esa /programs/whd/ state/righttowork.htm>; 05-1657 Pet. App. 35a-36a n.3 (collecting state laws).

Federal and state governments have also adopted a variety of approaches to union and agency shops in the

---

[1] This Court's decisions concerning public-sector workers, such as the nonmembers at issue here, are grounded in the First Amendment. *E.g.*, *Hudson*, 475 U.S. at 301-302. This Court has also construed federal labor statutes to confer the same rights on private-sector workers, in order "to avoid serious doubt of their constitutionality." *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961).

context of public-sector employment. The federal government, for example, does not permit federal employers and unions to enter into union-shop or agency-shop arrangements at all. See generally 5 U.S.C. 7102 (granting each employee the right to "refrain" from "assist-[ing] any labor organization"). In contrast, Washington, like several other States, generally authorizes public-sector employers and unions to enter into agency-shop (but not union-shop) agreements. *E.g.*, Wash. Rev. Code Ann. §§ 41.56.122(1), 41.59.100 (West 2006).

In the statute at issue here, Washington mitigated the impact of the agency-shop arrangement on nonmembers' freedom of association and speech by requiring unions to obtain nonmembers' affirmative authorization before using their fees for political purposes. Wash. Rev. Code Ann. § 42.17.760. That provision grants workers greater procedural protection than the constitutional floor by requiring unions to obtain nonmembers' affirmative authorization before using their compelled agency shop fees for political purposes, instead of putting the burden on nonmembers to opt out. Although not constitutionally required, the provision directly serves First Amendment values by protecting the rights of nonmembers, while ensuring that the unions' political activities reflect the views of those who fund them.

Washington thereby struck a reasonable balance between the two competing government interests. It chose to permit agency shops notwithstanding their "significant impingement on First Amendment rights" of workers, *Ellis*, 466 U.S. at 455-456, but conditioned that permission on the modest, and highly germane, requirement that unions obtain nonmembers' affirmative authorization before using their fees for political purposes, Wash. Rev. Code Ann. § 42.17.760. That require-

ment ensures that nonmembers' contributions to the political activities of the unions are made knowingly and voluntarily, in part by "remind[ing] those persons that they are giving money for political purposes and counteract[ing] * * * inertia." *Michigan State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997). Striking such a balance between competing government interests is a quintessentially appropriate exercise of the State's police power in this area.

C. As the Washington Supreme Court recognized, the affirmative-authorization requirement also "protect[s] the integrity of the election process from the perception that elected officials are improperly influenced by monetary contributions and the perception that individuals have an insignificant role to play." 05-1657 Pet. App. 12a. This Court has long recognized the government's authority to protect against the corruption or appearance of corruption that can accompany unions' political contributions, as well as the potential that workers' union dues or fees will be used to support political causes that they oppose. *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208 (1982) (*NRWC*); see pp. 25-27, *infra*. Washington law directly promotes that weighty interest by ensuring that any spending of nonmember dues on political activities actually reflects the will of the nonmembers because, like the contributions of nonmembers in virtually any other context, they involve the affirmative authorization of the workers.

II. THE AFFIRMATIVE-AUTHORIZATION REQUIREMENT DOES NOT ABRIDGE FREEDOM OF SPEECH OR ASSOCIATION, BUT INSTEAD PROMOTES IT

The Washington law at issue in no way impedes the First Amendment rights of unions. Indeed, unions re-

ceive preferential treatment under Washington law compared with other speakers. Washington requires only that unions obtain affirmative authorization from *nonmembers* before using their fees for political purposes—a practical requirement faced by everyone else who seeks to use other peoples' money for speech. Even so, unions are still favored vis-a-vis other speakers. Other groups must identify and seek out contributors, and even if they receive an affirmative pledge of support, they still face uncertain prospects of collecting. By contrast, Washington law authorizes unions to impose fees on nonmembers and requires employers to collect those fees through payroll deductions, which almost certainly increases the amount collected while reducing the union's collection costs. See, *e.g.*, Wash. Rev. Code Ann. §§ 41.56.122(1), 41.59.100. The First Amendment does not entitle unions to even more preferential treatment.

A. The Washington Law Does Not Infringe Union Members' Freedom Of Speech Or Association

1. The Washington Supreme Court held that Washington's affirmative-authorization requirement must satisfy strict scrutiny because "[r]egulation of First Amendment rights is always subject to exacting judicial scrutiny." 05-1657 Pet. App. 18a. But the level of scrutiny varies depending on the type of restriction at issue. See, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367 (1968) (applying intermediate scrutiny). Here, there is no cognizable restriction on the union's speech, and certainly none triggering strict scrutiny. The Washington law does not prohibit the union from speaking, regulate the content of the union's speech, or even limit the time, place, or manner of the union's speech. Nor does the statute limit the amount of money the union can raise or

spend on speech. Instead, having authorized unions to collect fees from nonmembers, it merely requires the union to ensure that nonmembers "say 'yes'" to the use of those compelled fees for political purposes, instead of merely ascertaining that they "fail[ed] to say 'no.'" 05-1657 Pet. App. 10a.

That affirmative-authorization requirement imposes no restriction on the First Amendment rights of unions, and furthers First Amendment values overall. Indeed, it is beyond dispute that unions may not compel the payment of dues from nonmembers for political activities with which those workers disagree. See pp. 10-11, *supra*. Unions enjoy no First Amendment right to take and use workers' wages to fund their own political agenda unless and until the workers object.

2. Nor is union members' freedom of association meaningfully implicated, much less violated. Because "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others," this Court has recognized "a First Amendment right to associate for the purpose of speaking." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1311-1312 (2006) (*FAIR*). The Washington statute, however, in no way infringes on that right. Union members are free to associate and pool their (own) funds. They remain free to determine the content of their shared message and the means of communicating it. And their ability to organize the union's internal affairs is likewise unaffected by the Washington law.

The opt-in requirement only restricts the unions' unique and state-enabled ability to compel fees from *nonmembers* and then use them for political purposes. It does not even bar that use of nonmembers' fees—it only requires the union to obtain their permission. Far

from abridging the freedom of association, that requirement supports it by protecting nonmembers' freedom not to associate with the union. "Freedom of association * * * plainly presupposes a freedom not to associate," especially when it comes to political activities. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984).

B. The Administrative Cost Of Obtaining Nonmembers' Authorization Is Not An Unconstitutional Burden

The Washington Supreme Court nonetheless held that the affirmative-authorization requirement is subject to strict scrutiny because the administrative costs of securing nonmembers' authorization "significantly burden the union's expressive activity." 05-1687 Pet. App. 27a; see *id.* at 31a-32a. That conclusion is fundamentally flawed as both a practical and legal matter. In reality, the administrative costs are minimal and, in any event, are better understood as a minor reduction in the administrative advantage conferred by the agency-shop arrangement, rather than the imposition of any burden.

1. The negligible administrative costs imposed by the Washington law do not approach a constitutional dimension. The requisite consent may be obtained through a routine mailing (and does not even have to be in writing, 05-1657 Pet. App. 11a). No additional mailing would even be necessary, because the union already sends a packet to nonmembers twice each year informing them of the right to object to paying fees for political expenses. *Id.* at 4a. The Washington court expressed concern that the need to obtain advance authorization would complicate the union's book-keeping, but as that court acknowledged, the union can simply "hold the

amount allocated to political activity in escrow while seeking affirmative authorization." *Id.* at 32a.[2]

The Washington Supreme Court expressed concern that "the lack of access to those funds could impact the timeliness of the union's political speech" while the union sought authorization. 05-1657 Pet. App. 32a. But that concern only underscores the extent to which the Washington court "turn[ed] the First Amendment on its head." *Id.* at 37a. This Court has long rejected similar arguments, explaining that such "union borrowing" would violate nonmembers' First Amendment rights by requiring them to subsidize political activities with which they might disagree, even if only temporarily. *Ellis*, 466 U.S. at 444; accord *Hudson*, 475 U.S. at 305. Thus, especially where there are "readily available alternatives" (here, obtaining consent before using money for political purposes), this Court has held that such borrowing cannot be justified by "administrative convenience." *Ellis*, 466 U.S. at 444. The union's administrative convenience is simply not a constitutional right, especially when contrasted against a nonmember's interest in not subsidizing the union's political speech.

That is particularly true because the challenged provision is better understood as a minor reduction in the unique advantages the State gives unions when it comes to nonmembers' political contributions in the agency-shop context, rather than the imposition of a burden, however small. Washington law as a whole *relieves* un-

---

[2] The Washington statute at issue does not require public disclosure of an organization's members or contributors. See, *e.g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 453-454, 462-463 (1958). Nor does it impose any penalties on group members or withhold generally applicable benefits from them. See, *e.g.*, *Healy* v. *James*, 408 U.S. 169, 180-184 (1972).

ions of administrative burdens faced by most if not all other speakers. As discussed, Washington permits unions to collect mandatory fees from nonmembers through paycheck withholding, and thereby reduces unions' collection costs while likely increasing the amount collected. See p. 14, *supra*. Every other organization needs to seek out contributions and, even if a potential contributor "opts in" with a pledge of support, it faces the difficult task of collecting the pledge. Far from *burdening* unions, Washington therefore *favors* them vis-a-vis other speakers.

Any remaining doubt is dispelled by this Court's decisions holding that far more serious burdens do not abridge union members' freedom of association. As discussed, unions have no First Amendment right to compel nonmembers to pay *any* agency shop fees, even when collective bargaining benefits the nonmembers. See p. 10, *supra*. It follows *a fortiori* that the First Amendment is not violated by the far lesser burden of obtaining nonmembers' consent before using a *portion* of their compelled fees for political activity.[3]

2. Citing this Court's decision in *Dale*, *supra*, the Washington court concluded that it must "give deference to the union's view of what would impair its political ex-

---

[3] Respondent's position is further undermined by this Court's holding that denial of food stamps to striking workers imposes no undue burden. *Lyng* v. *International Union*, 485 U.S. 360 (1988). As this Court explained, "strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right," even though "[i]t would be difficult to deny that [the prohibition] works at least some discrimination against strikers and their households." *Id.* at 368, 371. If the government can discriminatorily deny the generally available benefit of food stamps to striking union members, it can deny unions a benefit *not* available to other speakers—the right to use nonmembers' wages for political purposes without their authorization.

pression." 05-1657 Pet. App. 32a; see *id.* at 30a. That was error. At the outset, the court's reliance on *Dale* only underscores its inversion of the First Amendment. *Dale* upheld the Boy Scouts' right *not* to associate with individuals whose participation would impair the group's ability to express its message. 530 U.S. at 648. Here, the union is not complaining that a forced association—*i.e.*, an association forced on it by state laws—is interfering with its ability to communicate its message. To the contrary, the union seeks a greater degree of forced association between the nonmembers (or at least their fees) and the union to facilitate the dissemination of the union's message. Recognizing that claim would turn both *Dale* and the First Amendment on their heads.[4]

3. The Washington Supreme Court's conclusion that the affirmative-authorization requirement "violates the First Amendment rights of *nonmembers*" is inexplicable. 05-1657 Pet. App. 20a (emphasis added). The court observed that some nonmembers may support the union's political expenditures. *Ibid.* That is certainly possible, though it seems likely that the 5% who chose *not* to join the union will choose *not* to support the union's political activities, either. See *id.* at 4a. Even so, Washington does not prevent any nonmember from associat-

[4] In any event, the *Dale* Court did not simply defer to the Boy Scouts' assessment of the law's interference with its message. Rather, the Court found that the law actually required the organization to convey a message contrary to its beliefs. *Dale*, 530 U.S. at 648, 653-654. In *FAIR*, this Court similarly declined to defer to the law schools' views of what impaired their freedom of association, explaining that "a speaker cannot 'erect a shield' against laws requiring access 'simply by asserting' that mere association 'would impair its message.'" 126 S. Ct. at 1312 (quoting *Dale*, 530 U.S. at 653). There is no greater basis for deference to the union's views here.

ing with the union, authorizing the union to use his agency shop fees for political purposes, or otherwise contributing to the union. All such a worker must do is inform the union—the organization whose political activities he wants to support—of his consent. Such a simple notification requirement places no more of a burden on the freedom of association than a requirement that those employees who wish to join a union sign up. And it imposes less of a burden than the nonmembers face in supporting any other cause or group they might wish to support. That is, it imposes no constitutionally cognizable burden at all.

C. The Constitutional Floor For Protecting Nonmembers' First Amendment Rights Is Not Also A Constitutional Ceiling On Such Protections

The Washington Supreme Court's decision is premised on its erroneous belief that the constitutional *floor* that this Court has established for protecting the First Amendment rights of nonmembers against being compelled to pay for union political activities with which they disagree also establishes a constitutional *ceiling* on how far States can go in protecting those rights.

As discussed, unions have no constitutional right to compel membership or to collect agency shop fees from nonmembers. See p. 10, *supra*. If the government nonetheless authorizes unions and employers to enter into agreements requiring employees to pay such fees, dissenting workers have a constitutional right to "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute." *Hudson*, 475 U.S. at 310. Under that procedure, dissenting workers may

not be compelled to pay for union political activities with which they disagree, but the burden generally falls on a dissenter to object to the payment of any fees that would be used for political purposes. *Id.* at 306.

In outlining that constitutionally sufficient remedy, this Court did not so much as suggest that greater protection of nonmembers' First Amendment rights would violate unions' First Amendment rights. See *Keller* v. *State Bar*, 496 U.S. 1, 17 (1990) (noting that *Hudson* "outlined a *minimum* set of procedures") (emphasis added). In situations where a union had a statutory right to collect a union or agency shop fee, this Court described its remedial objective as "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). That objective protects only the union's statutory right to collect "the cost of collective-bargaining activities," *ibid.*; it does not provide an entitlement to some degree of windfall (generated by the laws of inertia) to cover the cost of political activities. Because Washington's affirmative-authorization requirement does not affect in any way the union's collection and use of agency shop fees for collective bargaining activities, it falls well within the broad remedial parameters identified by this Court in *Hudson* and *Abood*.

The Washington Supreme Court reached a contrary conclusion only by overreading statements in this Court's decisions to the effect that "[d]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." 05-1657 Pet. App. 16a (quoting *Street*, 367 U.S. at 774). But those state-

ments were premised on the relevant state of the law in *Street*, not a statement of constitutional law. Because the union in *Street* had an unconditional *statutory* right to use agency shop fees for political purposes in the absence of a worker's objection, this Court explained that the union should be able to rely on that right without fear of being penalized with broad injunctive or other relief in a class action. *Street*, 367 U.S. at 774. That concern is absent here because the affirmative-authorization requirement puts unions on notice that they have no right to use nonmembers' fees for political purposes without their approval. Thus, there is no concern about fair notice and no reason whatsoever to think that the opt-out, as opposed to opt-in, regime is constitutionally compelled.

To the contrary, the State's discretion to permit or prohibit agency shops logically entitles it to condition the statutory benefit to the union of an agency shop on greater protection for nonmembers than the Constitution requires. Governments may condition the availability of statutory benefits on private parties' willingness to forego even activities the First Amendment would otherwise protect. See, *e.g.*, *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545 (1983) (Congress may condition tax exemption on abstention from otherwise protected political activity); *Buckley* v. *Valeo*, 424 U.S. 1, 57 n.65 (1976) (Congress "may condition acceptance of public funds on an agreement by [a candidate for federal office] to abide by specified expenditure limitations" that would otherwise be unconstitutional). Washington's opt-in requirement is a reasonable and highly germane condition on unions' acceptance of the statutory right to

enter into collective bargaining agreements that compel nonmembers to pay agency shop fees.[5]

III. THIS COURT'S CAMPAIGN-FINANCE DECISIONS UNDERSCORE THE CONSTITUTIONALITY OF THE AFFIRMATIVE-AUTHORIZATION REQUIREMENT

The Washington Supreme Court's decision invalidating the State's opt-in requirement is also fundamentally out of step with this Court's decisions upholding *more* burdensome campaign-finance laws against First Amendment challenges. That disconnect provides an additional basis for overturning the decision below.

A. Under the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, it is unlawful for a union or corporation "to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). Although a union or corporation may establish "a separate segregated fund [SSF] to be utilized for political purposes," 2 U.S.C. 441b(b)(2) (Supp. IV 2004), such an SSF generally may not use "dues, fees, or other moneys required as a condition of membership

---

[5] The Washington Supreme Court asserted that "there is no indication that * * * the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles" when they voted in favor of the ballot initiative that included the affirmative-authorization requirement. 05-1657 Pet. App. 22a. That is clearly wrong, because on its face the affirmative-authorization requirement does just that and, of course, that view of the referendum not only reflects its text, but is the premise of the decision invalidating the provision. The Washington court may be correct that "the principal thrust of" the ballot initiative as a whole "was to protect the integrity of the election process." *Ibid.* But the way in which the affirmative-authorization requirement furthers that purpose is by protecting nonmembers (as well as the public) against the use of their compelled fees for political purposes they do not support.

in a labor organization or as a condition of employment," 2 U.S.C. 441b(b)(3)(A); see 11 C.F.R. 114.5(a)(1). Rather, the SSF operates as an opt-in requirement, barring a union or corporation from using workers' contributions for political purposes unless an employee affirmatively contributes funds to the SSF. See *ibid.*

Moreover, in addition to that opt-in requirement, it is generally unlawful for a union or its SSF to "solicit contributions * * * from any person other than its members and their families." 2 U.S.C. 441b(b)(4)(A)(ii). The only exception is that unions and their SSFs, like corporations and their SSFs, may "make 2 written solicitations for contributions during a calendar year" from employees and certain other individuals. 2 U.S.C. 441b(b)(4)(B); see 11 C.F.R. 114.6(a).

Such solicitations are carefully regulated to ensure that contributions are voluntary. Solicitations of a nonmember must be made by mail to the person's residence, and must be designed to prevent the labor organization or corporation conducting the solicitation from determining which recipients do not contribute or contribute $50 or less. 2 U.S.C. 441b(b)(4)(B). All potential donors, including union members, must also be informed of "the political purposes of [the] fund" and their "right to refuse to * * * contribute without any reprisal." 2 U.S.C. 441b(b)(3)(B) and (C); see 11 C.F.R. 114.6(c). The Federal Election Commission's regulations protect the anonymity of solicited nonmembers by requiring contributions to be sent to a custodian, who must keep detailed records of contributions and make various disclosures to the Commission. 11 C.F.R. 114.6(d).

To protect the voluntariness and anonymity of contributions, the Commission has also forbidden the use of payroll deductions to collect contributions from non-

members. 11 C.F.R. 114.6(e)(1). Unions and SSFs may use employers' payroll deduction systems to facilitate members' regular contributions (11 C.F.R. 114.5(k)(1)), but even when such systems are used "there must be an affirmative authorization by the contributor in order to permit the deduction." FEC Advisory Opinion 2001-04, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6360.

Like the Washington statute, Section 441b therefore permits a union to use a nonmember's wages for political purposes only if the nonmember has affirmatively authorized that use. Moreover, Section 441b is *more* restrictive than the Washington statute in several important respects. Under Washington law, a union may fund political activities with its general treasury funds, including funds derived from members' dues and nonmembers' agency shop fees (with the nonmembers' consent). Under federal law, however, a union may not do so with respect to federal elections. Instead, it must: incur the costs of establishing an SSF with a custodian who is subject to record-keeping and reporting obligations; solicit separate political contributions from members and nonmembers alike; and refrain from using payroll deductions to collect any contributions from nonmembers.[6]

B. Significantly, the constitutionality of Section 441b is well-settled. This Court has upheld the constitutionality of Section 441b in decisions that indicate, *a fortiori*, that Washington's less burdensome affirmative-authorization requirement is constitutional. For example, in

---

[6] The Washington statute exempts from its reach the financing of all campaigns "for a federal elective office." Wash. Rev. Code Ann. § 42.17.030 (West 2006). That provision underscores that funds raised in compliance with state laws must also comply with more demanding provisions of FECA to the extent the funds are spent on federal elections.

NRWC, in which this Court upheld Section 441b's solicitation limits, the Court explained that Section 441b "protect[s] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." 459 U.S. at 208. The Court further explained that Section 441b protects the public against unions' and corporations' ability to amass "substantial aggregations of wealth" that may "be used to incur political debts from legislators" but may not reflect contributors' actual support for an organization's message. *Id.* at 207.

Although *NRWC* involved a corporation without capital stock rather than a union, this Court drew no distinction between the different types of organizations in upholding Section 441b's solicitation limits in light of the long history of congressional regulation of unions' and corporations' political contributions and expenditures. 459 U.S. at 208; see *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 401-414 (1972) (detailing history of regulation of union political activity and long-standing rule that unions' participation can be limited to voluntary contributions to an SSF).

This Court later drew on *NRWC* in upholding Section 441b's ban on political contributions, noting that the statute protects "individuals who have paid money into a corporation or union for [non-political] purposes" while also "permit[ing] some participation of unions and corporations in the federal election process by allowing them to establish and pay the administrative expenses" of SSFs. *FEC* v. *Beaumont*, 539 U.S. 146, 154, 162-163 (2003) (quoting *NRWC*, 459 U.S. at 201, 208). For those reasons, this Court upheld Section 441b's ban on political contributions, notwithstanding the "administrative

burdens" required to establish and administer an SSF. *Id.* at 163; see *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003) (upholding amendments that broadened Section 441b to prevent circumvention of its prohibitions); *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (upholding state-law prohibition on corporate expenditures, in part because it "ensures that expenditures reflect actual public support for the political ideas espoused by corporations").

The Washington Supreme Court's decision in this case is irreconcilable with those cases. For example, because this Court recognized in *NRWC* that the government may limit solicitations of *voluntary* contributions, it follows that the government may condition the use of *involuntary* fees on nonmembers' consent. Similarly, because this Court recognized in *Beaumont* that the government may prohibit altogether the use of treasury funds for political activities, it follows that the government may condition the use of treasury funds derived from nonmembers' compelled fees for political activities on the nonmembers' consent.[7]

C. Respondent errs in arguing (Br. in Opp. 17-18) that *NRWC* is distinguishable because it involved a contribution limit, as opposed to an expenditure limit. While "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment," restrictions on political expenditures are subject

---

[7] In opposing certiorari, respondent argued (Br. in Opp. 17) that Washington's statute discriminates against unions because it does not apply to corporations. That issue, however, is not properly before this Court because it was not pressed or passed on below. See 05-1657 Pet. App. 25a n.6 ("The parties have not raised, and we do not address, any argument concerning § 760's application solely to labor organizations.").

to strict scrutiny. *Beaumont*, 539 U.S. at 161. That distinction is irrelevant here because the Washington statute does not impose an expenditure limit within the meaning of this Court's cases.

The Washington law directly regulates neither contributions nor expenditures, but instead regulates the means by which the union solicits the subset of contributions facilitated by the State's agency-shop laws. In that sense, it is analogous to the solicitation restrictions upheld under a relatively deferential standard of review in *NRWC*. The effect of Washington's statutes, like the provisions upheld in *NRWC*, is to regulate political contributions (namely, by requiring nonmembers' affirmative authorization). Indeed, any effect the affirmative-authorization requirement might have on unions' political expenditures or contributions would result not from a State-imposed limit on unions' expenditures or contributions, but from a reduction in nonmembers' contributions to unions' political activities (or the minimal administrative costs of seeking authorization). Thus, the statute regulates at most contributions, not expenditures.

In *McConnell*, this Court analyzed as a contribution limit FECA's prohibition against political parties' *spending* of soft money. 540 U.S. at 138-139. Although the plaintiffs there argued that "provisions restrict[ing] not only contributions but also the spending and solicitation of funds raised outside of FECA's contribution limits" were expenditure limits subject to strict scrutiny, this Court disagreed. *Id.* at 138. The Court explained that "[t]he relevant inquiry is whether the mechanism adopted to implement the contribution limit * * * burdens speech in a way that a direct restriction on the contribution would not." *Id.* at 138-139. Because the limits on parties' spending of soft money did not "limit[] the

total amount of money the parties can spend," but instead "simply limit[ed] the source and individual amount of donations," they were contribution rather than expenditure limitations. *Id.* at 139. The Washington affirmative-authorization requirement imposes direct limits on neither contributions nor expenditures, but simply regulates the terms by which a unique subset of funds—those facilitated by the state agency-shop laws—can be solicited. In essence, it says that consent to use those funds for political purposes *must be solicited*, and should not be presumed. Under *NRWC* and *McConnell*, therefore, the affirmative-authorization requirement is not an expenditure limit, but rather is subject to much more complaisant review.[8]

D. Respondent also errs in arguing (Br. in Opp. 18) that Washington's affirmative-authorization requirement is unconstitutional because it applies to ballot initiatives as well as candidate elections. Although *NRWC* involved only contributions to political candidates and not ballot initiatives (see *NRWC*, 459 U.S. at 210 n.7), that point hardly supports the Washington Supreme Court's decision. That court invalidated the Washington statute in its entirety, not only as applied to ballot initiatives. See 05-1657 Pet. App. 34a.

---

[8] While Washington's affirmative-authorization requirement is clearly not an expenditure limit subject to strict scrutiny, it is unclear whether it is even subject to the lesser scrutiny applicable to contribution limits. Washington does not prevent nonmembers from contributing to unions' political activities; does not limit the amount nonmembers can contribute (beyond providing that nonmembers' compelled agency shop fees must be the same as members' dues); and does not limit the uses to which contributions can be put. Thus, it is unclear whether *any* heightened First Amendment scrutiny applies here.

More fundamentally, the type of political expenditure (candidate or ballot initiative) has never mattered for purposes of the right not to have coerced fees used for political purposes and is of no moment here. Respondent relies (Br. in Opp. 18) on *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), which invalidated a flat ban on the use of corporate funds (without even the option of financing expenditures through an SSF or political action committee) for advocacy related to ballot initiatives. See *id.* at 794. *Bellotti* did not suggest that corporate and union participation in referenda are wholly immune from regulation, and instead it affirmatively endorsed disclosure requirements. See *id.* at 792 n.32.

As discussed, Washington's affirmative-authorization requirement does not restrict unions' spending on ballot initiatives or, for that matter, on any particular political topics. It only requires unions to obtain nonmembers' consent before using their compelled fees for political purposes in general. The First Amendment requires an opt-out right in this context for the use of compelled fees for *political* purposes, not just for their use in candidate elections. The legitimate First Amendment values that are served by requiring affirmative consent are in no way limited to candidate elections, and so the provision is constitutional regardless of the subject matter of the unions' political speech. Cf. *Bellotti*, 435 U.S. at 794 n.34 (distinguishing between the corporate funds at issue there and funds raised from union members' compelled agency fees).

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed and the cases remanded.

Respectfully submitted.

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

STEVE N. HAJJAR
Attorney
Federal Election Commission

HOWARD M. RADZELY
Solicitor

KATHERINE E. BISSELL
Associate Solicitor

NORA CARROLL
Senior Attorney
Department of Labor

NOVEMBER 2006

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

DOUGLAS N. LETTER
AUGUST E. FLENTJE
Attorneys

Nos. 05-1589 & 05-1657

IN THE
Supreme Court of the United States

GARY DAVENPORT, ET AL.,
Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

ON A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF OF ASSOCIATION OF AMERICAN EDUCATORS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

LA RAE MUNK
ASSOCIATION OF AMERICAN EDUCATORS
26405 Puerta Real
Suite 230
Mission Viejo, C.A. 92691
(800) 704-7799

ROBERT K. KELNER
Counsel of Record
KEITH A. NOREIKA
MICHAEL E. PAULHUS
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Amicus Curiae Association of American Educators

November 2006

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE WASHINGTON SUPREME COURT'S DECISION RESTS ON FUNDAMENTAL MISREADINGS OF THIS COURT'S DECISIONS. 2

II. THERE EXISTS NO FIRST AMENDMENT RIGHT FOR WEA TO ASSOCIATE WITH AGENCY FEE PAYERS BECAUSE, BY DEFINITION, AN AGENCY FEE PAYER HAS CHOSEN NOT TO ASSOCIATE WITH WEA. 4

A. Resignation From WEA With Intent To "Support" WEA Makes No Sense And Does Not Happen In Practice. 6

B. Resignation From WEA Results In A Loss Of Workplace Rights. 8

C. Resignation From WEA Frequently Leads To Threats, Intimidation, And A Hostile Workplace. 9

III. WASHINGTON REVISED CODE § 42.17.760 REASONABLY PROTECTS THE THREATENED FIRST AMENDMENT

RIGHTS OF AGENCY FEE PAYERS NOT TO ASSOCIATE WITH WEA. 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 3, 4
Boy Scouts of America v. Dale, 530 U.S. 640 (2000) 2, 5
Brotherhood of Railway and Steamship Clerks v. Allen, 373 U.S. 112 (1963) 3-4, 4
Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).....12, 14
Communications Workers of America v. Beck, 487 U.S. 735 (1988) 12
Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 2, 2-3
Good v. Associated Students of University of Washington, 542 P.2d 762 (Wash. 1975)..... 3
International Association of Machinists v. Street, 367 U.S. 740 (1961)..... 4
Lathrop v. Donohue, 367 U.S. 820 (1961) 3
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 2
State v. Washington Education Association, 130 P.3d 352 (Wash. 2006) 3, 4, 5

STATUTES

Wash. Rev. Code § 41.59.060(2) 7
Wash. Rev. Code § 42.17.680..... 15
Wash. Rev. Code § 42.17.760..... passim

LEGISLATIVE MATERIALS

An Assessment of the Use of Union Dues for Political Purposes: Is the Law Being Followed or Violated?: Hearing Before the Subcomm. on Workforce Protections of the

H. Comm. on Education and the Workforce, 107th Cong. (2002) 11
Campaign Finance–Are Political Contributions Voluntary?: Union Dues and Corporate Activity: Hearing Before the S. Comm. on Rules and Administration, 105th Cong. (1997) (unpublished testimony on file with AAE), *available at* http://www.nwpe.org/pdf_files/omlin_senate_rules_testimony_06-25-1997.pdf 8, 15
Field Hearing on Mandatory Union Dues and the Abuse of Worker Rights: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce, 105th Cong. (1998) 13-14
H.R. Rep. No. 105-397 (1997) 8, 9, 12
Mandatory Union Dues: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce, 105th Cong. (1997) 8-9, 10, 12, 13
Providing Employees Notice of Rights Regarding Union Security Agreements: Hearing on H.B. 1738 Before H. Commerce & Labor Comm., 54th Leg., Reg. Sess. (Wash. 1995) 9

MISCELLANEOUS

Jeff Canfield, Comment, *What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001) 12-13
Comment, *Freedom from Political Association: The Street & Lathrop Decisions*, 56 Nw. U. L. Rev. 777 (1962) 3
Ken Eikenberry, *Teachers' Union Presides Over a Kangaroo Court*, Port Orchard Independent, Sept. 14, 2002 14

Evergreen Freedom Foundation, *Barrier to Learning: How the National Education Association Prevents Students and Teachers From Achieving Academic and Professional Excellence* (July 2004), *available at* http://www.effwa.org/NEA-Magazine.pdf. 6-7, 10, 11

Rep. Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 Harv. J. on Legis. 347 (1998) 8, 9

Jeff Leer, *Why I'm Suing My Union*, Wall St. J., July 31, 1997, at A18 11

Letter from Lynn Jones, Spokane Education Association President, to Spokane Education Association Building Representatives (Oct. 16, 1996), *available at* http://www.nwpe.org/pdf_files/union_AFP _ reveal _Letter.pdf. 12

Letter from Kathy O'Toole, WEA General Counsel, to Jeff Leer (Mar. 12, 1997), *available at* http://tpp.effwa.org/wea_misdeeds/WEA_1997_Leer_Letter.pdf. 10, 11

Cindy Omlin, *Not That Easy to Opt Out of Union Politics*, Seattle Post Intelligencer, Sept. 24, 2006 6

Spokane Collective Bargaining Agreement (Sept. 1, 2003 to Aug. 31, 2006), *available at* http://www.spokaneschools.org/CBA/agreements/2003-2006/SEA/Certificated.pdf 13

Seattle Public Schools Collective Bargaining Agreement (2004-2009), *available at* http://www.seattlewea.org/Cert%20CBA/CertCBAArt1.htm#12 13

INTEREST OF AMICUS CURIAE[1]

Association of American Educators ("AAE"), a nonprofit professional association, is the largest national, non-union professional teacher association. AAE serves more than 30,000 at-large primary, secondary, and college educators in all 50 states. AAE has fourteen state affiliates, including Northwest Professional Educators ("NWPE"), which serves teachers in the state of Washington. NWPE's membership includes approximately 300 Washington educators. AAE and its affiliates provide professional liability insurance to it members, as well as professional development resources, teacher scholarships, and classroom mini-grants.

AAE and its state affiliates frequently participate in legislative, administrative, and judicial proceedings that present issues affecting the rights of non-union teachers who are agency fee payers. AAE believes that its participation as *amicus curiae* will offer the Court a distinct perspective on the questions presented.

This case presents the important questions: 1) whether labor union officials have a First Amendment right to seize and use, to advance their own political agenda, the wages of employees who have chosen not to become union members, and 2) whether Washington Revised Code § 42.17.760, which prohibits labor unions and their officials from seizing and using the wages of nonmembers for partisan political campaigns without obtaining the nonmembers' affirmative consent, violates the First Amendment rights of labor unions. The Court's resolution of these questions will directly impact AAE's

---

[1] Letters from Petitioners and Respondent indicating consent to file this brief are on file with the Clerk. Pursuant to this Court's Rule 37.6, AAE states that no counsel for any party authored this brief in whole or in part. Nor did any person or entity, other than AAE, make a monetary contribution to the preparation or submission of this brief.

members. Accordingly, AAE has a strong interest in this matter. Moreover, AAE can provide the Court with an appreciation of the motivations driving teachers to disassociate from the Washington Education Association ("WEA") by becoming agency fee payers and offer examples of how the opt-out procedure from union dues works (or fails to work) in practice.

SUMMARY OF ARGUMENT

The Washington Supreme Court's decision is flawed in numerous respects. First, the opinion misinterprets this Court's decisions regarding the right to expressive association and union rights to collect agency fees. Second, it ignores the reality that nonmember teachers affirmatively have chosen to disassociate themselves from WEA and therefore cannot be classified as "nonmember supporters" of the union's political expenditures. Finally, the decision fails to appreciate that an agency fee payer has a constitutional right not to associate with the union and that Washington Revised Code § 42.17.760 reasonably protects that right.

ARGUMENT

I. THE WASHINGTON SUPREME COURT'S DECISION RESTS ON FUNDAMENTAL MISREADINGS OF THIS COURT'S DECISIONS.

It is well-established that the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). In *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), this Court cited a dissent by Justice Douglas for the proposition that "[g]overnment may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." *Id.* at

575. Moreover, in *Lathrop v. Donohue*, 367 U.S. 820 (1961), Justice Douglas wrote in dissent that "the right of association is an important incident of First Amendment rights. The right to belong – or not to belong – is deep in the American tradition." *Id.* at 881-82. *See also* Comment, *Freedom from Political Association: The Street & Lathrop Decisions*, 56 Nw. U. L. Rev. 777, 778 & 790 (1962) (when interests of group and individual clash regarding speech and association rights the law should seek to protect individual, who suffers greater injury in being compelled to speak than does group in being denied dissenter's funds). In *Good v. Associated Students of University of Washington*, 542 P.2d 762 (Wash. 1975), the Washington Supreme Court recognized that the "[f]reedom to associate carries with it a corresponding right to not associate." *Id.* at 766. Moreover, the decision below in this case recognizes the right of agency fee payers not to associate. *See State v. Washington Education Association*, 130 P.3d 352, 358 (Wash. 2006).

By contrast, WEA and its members have no constitutionally protected right to associate with agency fee payers who have chosen not to associate with them. At its core, the Washington Supreme Court's decision is based on the mistaken assumption that there exists such a First Amendment associational right for union members, even though by becoming nonmembers the agency fee payers affirmatively have declined to associate with the union members.

In this regard, the lower court erred by relying on this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), for the proposition that "[t]he United States Supreme Court has held that a union has the right to use nondissenting nonmember fees for political purposes." *Washington Education Association*, 130 P.3d at 362. The error is evident when viewed in the context of the earlier precedent of this Court upon which *Abood* relied. *Abood* quoted *Brotherhood of Railway and*

Steamship Clerks v. Allen, 373 U.S. 112 (1963), which was concerned with the "infringe[ment of] the unions' right to expend uniform exactions under the *union-shop agreement*," *Abood*, 431 U.S. at 239 (quoting *Allen*, 373 U.S. at 122) (emphasis added), not under the *First Amendment*. Accordingly, reliance on *Abood* does not demonstrate that there is any general right under the First Amendment for unions to use nonmembers' fees for political purposes.

The lower court's opinion also incorrectly relies upon *International Association of Machinists v. Street*, 367 U.S. 740 (1961), for the proposition that "dissent is not to be presumed–it must affirmatively be made known to the union by the dissenting employee." *Washington Education Association*, 130 P.3d at 358-59 (quoting *Street*, 367 U.S. at 774). *Street* was decided on statutory grounds; the Court did not reach First Amendment issues. *See Street*, 367 U.S. at 770-71. Nothing in *Street* supports the Washington Supreme Court's conclusion that this Court invested its statutory interpretation in *Street* with the weight of a broad constitutional ruling.

In fact, once an employee has resigned from the union, dissent should be presumed. AAE is particularly well-placed to demonstrate from a practical standpoint the error manifest in the Washington Supreme Court's reasoning regarding the presumption of dissent.

II. THERE EXISTS NO FIRST AMENDMENT RIGHT FOR WEA TO ASSOCIATE WITH AGENCY FEE PAYERS BECAUSE, BY DEFINITION, AN AGENCY FEE PAYER HAS CHOSEN NOT TO ASSOCIATE WITH WEA.

The Washington Supreme Court relies on *Boy Scouts of America v. Dale* for the proposition that Washington Revised Code § 42.17.760 violates WEA's First Amendment right of expressive association. *See Washington Education Association*, 130 P.3d at 364

(citing *Dale*, 530 U.S. at 653). This conclusion requires one to recognize three categories of teachers: union members, "supporting nonmembers," and dissenting nonmembers (*i.e.*, individuals opposed to the union's political expenditures). The opinion below seeks to protect the right of union members to associate with "supporting nonmembers." The problem with this analysis is that, in the experience of AAE, "supporting nonmembers" do not exist.

The recognition of this analytical flaw highlights the nonsensical nature of assertions by the Washington Supreme Court such as "[Washington Revised Code §760] has the practical effect of inhibiting one group's political speech (the union and *supporting nonmembers*) for the improper purpose of increasing the speech of another group (the dissenting nonmembers)." *Washington Education Association*, 130 P.3d at 359 (emphasis added). *See also id.* at 360 (burden placed on "*supporting nonmembers* and the union") (emphasis added); *id.* at 363 ("This case involves . . . regulation of the relationship between the union and agency fee payers with regard to political speech."). There is no protected relationship between the union and agency fee payers because, as a practical matter, there is no such thing as a group of "supporting nonmembers."

AAE is familiar with the reasons why teachers become "nonmembers." Suffice it to say, they do *not* do so to "support" WEA. Under Washington law, a nonunion agency fee payer must pay 100% of union dues unless the individual files a timely objection to the political portion of the agency fee. Upon resigning from the union, a teacher loses important workplace rights and professional liability coverage; moreover, he or she may be subjected to threats and a hostile workplace. To suggest that one would pay 100% of union dues, affirmatively forfeit important rights, sacrifice liability coverage, run the gauntlet of hostile coworkers, and still seek to support the

union's political speech makes no sense. There would be nothing to gain from such a situation and everything to lose. As a practical matter, teachers resign from WEA because they disagree with the union's politics and they want to have the right to receive a refund of the political portion of their dues. Both of these reasons are inconsistent with the Washington Supreme Court's conclusion that these members wish to support the union's political agenda.

A. Resignation From WEA With Intent To "Support" WEA Makes No Sense And Does Not Happen In Practice.

In light of the fact that, as discussed below, resignation from WEA results in the loss of workplace rights and liability insurance, accompanied by significant pressure from WEA not to become an agency fee payer and potential hostility from colleagues, a teacher in Washington who becomes an agency fee payer must have a very good reason for doing so. In some cases, an individual may be motivated by the possibility of recovering from WEA approximately 20 to 25% of dues. For example, Seattle public school teachers pay the union more than $1,000 annually and receive a rebate of approximately $250. *See* Cindy Omlin, *Not That Easy to Opt Out of Union Politics*, Seattle Post Intelligencer, Sept. 24, 2006. In the experience of AAE, it is more often the case that individuals go to all the trouble and endure the attendant hardships in order to stand by their principles and to object to the union's spending their money on political causes that they oppose.[2] Both frugal

---

[2] AAE member Jeff Leer of Sedro-Woolley, Washington, put the matter succinctly: "Teachers simply want the freedom that all other Americans enjoy–the freedom to associate with people who share their values, and the freedom to have their hard-earned money support candidates and issues they believe in." Evergreen Freedom Foundation, *Barrier to Learning: How the National Education* (...continued)

nonmembers and political dissenters alike seek to have the political portion of their agency fee refunded, thus disassociating themselves from the union. This disassociation from the union for political purposes excludes both of these classes from the alleged group of "supporting nonmembers" identified by the Washington Supreme Court.

It is important to recognize that a teacher who has resigned from union membership to become an agency fee payer still must pay 100% of union dues unless he or she affirmatively objects to the political portion of the agency fee. *See* Wash. Rev. Code § 41.59.060(2). Therefore, for the Washington Supreme Court's associational rights analysis to make sense, one must posit the existence of individuals who affirmatively choose: 1) to become nonunion agency fee payers, 2) to forfeit their workplace rights, 3) to lose their professional liability insurance, 4) to pay the same fee as union members, and 5) to incur the scorn of coworkers, even though they in fact support the union's political agenda and wish to associate with the union members.[3] In AAE's experience, there is no such class of "supporting nonmembers." Accordingly, Washington Revised Code § 42.17.760 cannot be said to infringe any right of the union members to associate.

Association Prevents Students and Teachers From Achieving Academic and Professional Excellence 8 (July 2004), *available at* http://www.effwa.org/NEA-Magazine.pdf.

[3] Because of numerous restrictions imposed on agency fee payers trying to recover a refund of political dues, some agency fee payers may be denied a refund of the portion of their dues supporting the union's political agenda. But this does not mean that such individuals "support" WEA in the sense of agreeing with and seeking to fund the political activity of the union. *See infra* Part III.

B. Resignation From WEA Results In A Loss Of Workplace Rights.

If a teacher in Washington wants to exercise his or her right not to associate with WEA for political purposes, the teacher is required to resign from membership in the union. This action brings with it significant consequences. The agency fee payer can no longer vote on his or her employment contract; he or she cannot vote for union officials and negotiators; the objector loses the right to sit on some school policymaking committees; the objector often loses the union's representation in filing a grievance regarding an adverse job action under the collective bargaining agreement; and the objector loses the professional liability insurance protection provided by the union. *See* H.R. Rep. No. 105-397, at 5 (1997) (finding that to assert a refund to non-collective bargaining dues "the union may require the employee to resign from the union and, in the process, the employee loses critical workplace rights such as the right to ratify a contract or vote to go on strike"); *Campaign Finance–Are Political Contributions Voluntary?: Hearing Before the S. Comm. on Rules and Administration*, 105th Cong. (1997) (unpublished testimony on file with AAE), *available at* http://www.nwpe.org/pdf_files/omlin_senate_rules_testimony_06-25-1997.pdf [hereinafter "*Campaign Finance*"] (statement of Cindy Omlin, who is now Executive Director of NWPE, AAE's Washington affiliate, testifying regarding rights lost by Washington teachers that object to political fees).

These consequences are not limited to Washington teachers. *See, e.g.*, Rep. Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 Harv. J. on Legis. 347, 361 (1998) (explaining that employee who resigns from union "loses considerable workplace rights, such as the right to ratify a contract or to go on strike"); *Mandatory Union Dues: Hearing Before the H.*

Subcomm. on Employer-Employee Relations of the Comm. on Education and the Workforce, 105th Cong. 15 (1997) [hereinafter "*Mandatory Union Dues*"] (statement of Kerry Gipe) (explaining that political fee objectors were stripped of the right to vote on contracts or whether to enter into a strike). In exchange for surrendering these important workplace rights, the agency fee payer is entitled to claim the political portion of the agency fee, which amounts to a small refund.

C. Resignation From WEA Frequently Leads To Threats, Intimidation, And A Hostile Workplace.

In addition to forfeiting workplace rights, political objectors often are subject to verbal and physical harassment. Cindy Omlin, who is now Executive Director of NWPE, AAE's Washington affiliate, testified before the Washington Legislature that "[n]umerous teachers who object to the [WEA's] political activity have shared with me that they would rather forfeit their Constitutional rights than face the blackballing, harassment, intimidation, and potential property damage they fear from some union members. This fear is legitimate–both myself and one other teacher in my building have been retaliated against with offensive letters and ostracism after challenging the union's political views." *Providing Employees Notice of Rights Regarding Union Security Agreements: Hearing on H.B. 1738 Before H. Commerce & Labor Comm.*, 54th Leg., Reg. Sess. (Wash. 1995) (testimony of Cindy Omlin). *See id.* (stating that when Washington teachers exercise their rights to object, they are "harassed as 'freeloaders' and 'enemies of public education'"). *See also* H.R. Rep. No. 105-397, at 8-9 (summarizing testimony of individuals as to coercion and threats received upon resignation from unions); Knollenberg, *The Changing of the Guard*, 35 Harv. J. on Legis. at 364 (detailing how employees who resign from unions as political objectors are often subject to "threats

of life and family, intimidation, insults and coercion"); *Mandatory Union Dues,* 105th Cong. at 15 (statement of Kerry Gipe) (political fee objectors were "accosted at work, . . . accosted on the street, . . . harassed, intimidated and threatened").

A Washington teacher, who chose to remain anonymous because of fear of reprisal, summed up the matter well, stating that "[t]hese people (the local association) can be quite intimidating. Being outnumbered about a hundred-and-fifty to one, what it really comes down to is a lack of time – I don't have the time to fight with them or keep looking over my shoulder." Evergreen Freedom Foundation, *Barrier to Learning: How the National Education Association Prevents Students and Teachers From Achieving Academic and Professional Excellence* 16 (July 2004), *available at* http://www.effwa.org/NEA-Magazine.pdf.

Not only does the teacher face potential threats from co-workers, teachers unions themselves have threatened and have in some cases brought legal action against individual teachers who have attempted to challenge political fees or sought to inform Washington teachers of their right to become agency fee payers and to opt out of paying the political portion of the fee. AAE member and Washington elementary school teacher Jeff Leer's case provides an example. Mr. Leer requested that his school district stop deducting from teachers' paychecks expenditures for WEA's "community outreach program," which assessment he believed was being used to fund impermissible political expenditures. Mr. Leer received a letter from the General Counsel of the WEA, which stated, "You have repeatedly and forcefully asked [your district] to stop collecting $1.00 per month political education dues from WEA members." Letter from Kathy O'Toole, WEA General Counsel, to Jeff Leer (Mar. 12, 1997), *available at* http://tpp.effwa.org/wea_misdeeds/WEA_1997_Leer_Letter.pdf. The letter went on to "warn"

Mr. Leer that WEA would sue him if he continued his allegedly tortious behavior of trying to make the district stop collecting these fees. *Id.* It turns out that Mr. Leer was right about the assessments. WEA's lobbyist has since admitted under oath that the community outreach program was "an internal ploy to raise more WEA-PAC money." Jeff Leer, *Why I'm Suing My Union*, Wall St. J., July 31, 1997, at A18.

As another example of WEA's use of litigation to threaten teachers, Washington educators and AAE members Cindy Omlin and Barbara Amidon were sued personally by WEA in retaliation for their publication of a homemade newsletter titled the *WEA Challenger Network News*, which sought to inform teachers of their rights to become agency fee payers and to opt out of paying the political portion of their agency fees. The union eventually dismissed the action after a year and a half of litigation. *See* Evergreen Freedom Foundation, *Barrier to Learning* at 13.

The use of threats and lawsuits to intimidate prospective agency fee payers and dues objectors is not limited to Washington. Kathleen Klamut, a school psychologist in Ohio, testified before a congressional committee that, in response to her request to be deemed a religious objector regarding the payment of union dues, "[m]y employer reported to me via e-mail that the [Ohio Education Association] representative . . . was going to take legal action against me because of my request for religious accommodation. Her exact quote was they were going to come after me. I'm not sure what that means, but it sounds pretty menacing, when you're part-time personnel." *An Assessment of the Use of Union Dues for Political Purposes: Is the Law Being Followed or Violated?: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and the Workforce*, 107th Cong. 8 (2002).

Another effective tactic used to intimidate and discourage people from becoming agency fee payers is the identification and distribution of lists of agency fee payers to union employees. Publication of such lists creates a hostile environment for political objectors. *See Mandatory Union Dues*, 105th Cong. at 15 (statement of Kerry Gipe) (explaining that union political fee objectors "had [their] names posted immediately on both union property and company property accusing [them] of being scabs," resulting in a "very hostile environment among [] fellow workers"); *id.* at 21-22 & 42 (examples of lists of political fee objectors signed by the president of the local union or published in local newsletter). AAE members in Washington have experienced forms of this singling out by WEA, resulting in harassment by union members. *See, e.g.*, Letter from Lynn Jones, Spokane Education Association President, to Spokane Education Association Building Representatives (Oct. 16, 1996) (listing names of agency fee payers challenging the WEA), *available at* http://www.nwpe.org/pdf_files/union_AFP_reveal_Letter.pdf.

III. WASHINGTON REVISED CODE § 42.17.760 REASONABLY PROTECTS THE THREATENED FIRST AMENDMENT RIGHTS OF AGENCY FEE PAYERS NOT TO ASSOCIATE WITH WEA.

The Washington statute at issue represents a reasonable accommodation of non-union members' First Amendment rights and an acknowledgement of the significant burdens imposed on agency fee payers seeking to secure a refund of political dues. It has been well-documented that a majority of union members are unaware of their rights to have political expenses refunded under *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). *See* H.R. Rep. No. 105-397, at 6-8; Jeff Canfield, Comment, *What a*

Sham(e): The Broken Beck Rights System in the Real World Workplace, 47 Wayne L. Rev. 1049 (2001). For practical examples, one can review the collective bargaining agreements of the Spokane and Seattle school districts and see that while the agreements reference the ability to become agency fee payers, they contain no reference to any right of agency fee payers to object and receive a refund of political fees. *See, e.g.*, Spokane Collective Bargaining Agreement, at 8 (Sept. 1, 2003 to Aug. 31, 2006), *available at* http://www.spokaneschools.org/CBA/agreements/2003-2006/SEA/Certificated.pdf; Seattle Public Schools Collective Bargaining Agreement, at § H (2004-2009), *available at* http://www.seattlewea.org/Cert%20CBA/CertCBAArt1.htm#12.

Further complicating matters is the fact that union members who wish to become agency fee payers must file their notice at the beginning of the school year, a particularly busy time for teachers. *See Mandatory Union Dues*, 105th Cong. at 44 (statement of Bob Williams) (stating that teachers were required to resign from the union between August 1 and August 31, a period when Washington teachers were on vacation). Once a teacher becomes an agency fee payer, to claim a refund he or she must decipher a thick packet containing numerous appendices replete with financial documents and determinations of whether certain activity is deemed a chargeable or nonchargeable expense. Additionally, in some cases letters requesting a refund of political fees or seeking to resign from the union are lost or the union deems the attempt to opt out to be insufficient. *See Field Hearing on Mandatory Union Dues and the Abuse of Worker Rights: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce*, 105th Cong. 30 (1998) (testimony of Nadia Q. Davies) (California teacher detailing ordeal involved in resigning her membership in a teachers' union, which included numerous lost letters, a 15-day period to withdraw, some of the letters being

rejected as untimely, and others as not worded properly. Ultimately, the witness's husband had to hand deliver a letter and wait for it to be date and time stamped by the teacher's union office before she could exercise her right to withdraw.).

As further evidence of the challenges facing Washington teachers in declining to associate with WEA on political matters, agency fee payers wishing to challenge the union's calculation of the objector's refund under *Chicago Teachers Union, Local No. 1 v. Hudson* are confronted with considerable procedural obstacles.[4] To pursue this right a teacher must take off a day from teaching to attend a hearing before a decisionmaker appointed by WEA, which for some teachers will require considerable travel. This is a significant burden for conscientious teachers who are dedicated to their students and do not wish to disrupt the learning process. At the hearing the teacher is provided one hour to accomplish the Sisyphean task of reviewing 12 inches of documentation that he or she is viewing for the first time. The teacher must then convince the arbitrator that WEA's determination of chargeable expenditures is improper. Former Washington State Attorney General Ken Eikenberry found the process so unfair that he described it by writing: "[H]aving visited the old Soviet Union as a guest of the Procurator General, I believe their administrative hearings were more fair than the WEA process." Ken Eikenberry, *Teachers' Union Presides Over a Kangaroo Court*, Port Orchard Independent, Sept. 14, 2002.

---

[4] Although Washington Revised Code § 42.17.760 does not address the right under *Hudson* for agency fee payers to challenge the union-determined refund, the inequity of this process provides insight as to why procedural protections such the statute at issue are important to protect agency fee payers' rights not to associate with the union.

In 1992, Washington voters passed an initiative that blocked unions from deducting contributions to a union's PAC without members' prior written consent. *See* Wash. Rev. Code § 42.17.680. After this law went into effect, teacher contributions to WEA-PAC dropped from approximately 45,000 to 8,000 members out of 65,000 total members. *See Campaign Finance*, 105th Cong. (statement of Cindy Omlin). This precipitous decline indicates that, when provided with an easy mechanism to choose to support the WEA's political message through contributions to the union's PAC instead of the former opt-out regime, only about 12% of union members chose to continue supporting WEA's political expenditures. Considering that so few union members choose to support WEA's political expenditures, the Washington statute at issue, Washington Revised Code § 42.17.760, is an eminently reasonable measure to protect the rights of non-union members to disassociate themselves from a union's political expenditures that they do not wish to support.

CONCLUSION

The decision of the Supreme Court of Washington should be reversed.

Respectfully submitted,

LA RAE MUNK
ASSOCIATION OF
AMERICAN EDUCATORS
26405 Puerta Real
Suite 230
Mission Viejo, C.A.
92691
(800) 704-7799

ROBERT K. KELNER
Counsel of Record
KEITH A. NOREIKA
MICHAEL E. PAULHUS
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Amicus Curiae Association of American Educators

November 2006

952 A

Nos. 05-1589, 05-1657

Supreme Court, U.S.
FILED
DEC 15 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GARY DAVENPORT, *et al.*,
Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

On Writs of Certiorari to the Supreme Court of Washington

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JONATHAN P. HIATT
LAURENCE E. GOLD
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

PATRICK J. SZYMANSKI
1900 L Street, NW
Washington, DC 20036

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. SECTION 760 DOES NOT SERVE WASHINGTON STATE'S INTERESTS IN REGULATING CAMPAIGN FINANCES	4
II. SECTION 760 DOES NOT PROTECT THE FIRST AMENDMENT RIGHTS OF AGENCY SHOP FEE PAYERS	16
CONCLUSION	26

TABLE OF AUTHORITIES

CASES Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1976) ..... *passim*
Abood v. Detroit Board of Education, 60 Mich. App. 92, 230 N.W.2d 322 (1975) 19-20
Allen v. Southern Railway Co., 249 N.C. 491, 107 S.E.2d 125 (1959) 18, 19
Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 11, 15-16
Buckley v. Valeo, 424 U.S. 1 (1976) 11, 12, 13, 14
California Medical Association v. Federal Election Commission, 453 U.S. 182 (1981) 13
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) 21
Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 10
City of Ladue v. Gilleo, 512 U.S. 43 (1994) 16
Colorado Republican Federal Campaign Committee v. Federal Election Commission, 578 U.S. 604 (2000) 11
Communications Workers v. Beck, 487 U.S. 735 (1988) 24-25
Ellis v. Railway Clerks, 466 U.S. 435 (1984) 21
Ellis v. Railway Clerks, 685 F.2d 1065 (9th Cir. 1982) 21
Federal Election Commission v. Beaumont, 539 U.S. 146 (2003) 10, 13-14
Federal Election Commission v. National Right to Work Committee, 459 U.S. 195 (1982) 10, 15
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 10, 16
Keller v. State Bar of California, 496 U.S. 1 (1990) 25

TABLE OF AUTHORITIES—Continued

Page

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 26
Machinists v. Street, 367 U.S. 740 (1961) ..... *passim*
Machinists v. Street, 215 Ga. 27, 108 S.E.2d 796 (1959) 18
Marquez v. Screen Actors Guild, 525 U.S. 33 (1998) 17, 21, 26
McConnell v. Federal Election Commission, 540 U.S. 93 (2003) 6, 11
Nixon v. Shrink Missouri Government PAC, 528 U.S. 382 (2000) 9, 12, 13
Pattern Makers v. NLRB, 473 U.S. 95 (1985) 20, 25
Railway Clerks v. Allen, 373 U.S. 113 (1963) ..... *passim*
Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1953) 22, 23, 24
Randall v. Sorrell, 126 S. Ct. 2479 (2006) 11, 12
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 16
Romer v. Evans, 517 U.S. 620 (1996) 8
State ex rel. Evergreen Freedom Foundation v. Washington Education Association, 140 Wash. 2d 615, 999 P.2d 602 (2000) 4, 5, 7-8, 13
State ex rel. Public Disclosure Commission v. Washington Education Association, 156 Wash. 2d 543, 130 P.3d 352 (2006) 7
Washington State Republican Party v. Washington State Public Disclosure Commission, 141 Wash. 2d 245, 4 P.3d 808 (2000) 7, 8

STATUTES

2 U.S.C. § 431 *et seq.* 6
2 U.S.C. § 431(17) 6
2 U.S.C. § 434(f)(3) 6
2 U.S.C. § 441b(a) 6

TABLE OF AUTHORITIES—Continued

	Page
2 U.S.C. § 441b(b)(2)	6
2 U.S.C. § 441b(b)(3)	6
2 U.S.C. § 441b(b)(4)	6
Wash. Rev. Code. § 42.17.020(15)	10
Wash. Rev. Code. § 42.17.020(22)	10
Wash. Rev. Code. § 42.17.020(28)	11
Wash. Rev. Code. § 42.17.020(35)	5, 15
Wash. Rev. Code. §§ 42.17.80-.93	5
Wash. Rev. Code. §§ 42.17.100-42.17.120	5
Wash. Rev. Code. §§ 42.17.561-42.17.575	5
Wash. Rev. Code. § 42.17.610	6
Wash. Rev. Code. § 42.17.620	6
Wash. Rev. Code. § 42.17.640	6, 13
Wash. Rev. Code. § 42.17.640(1)	5
Wash. Rev. Code. § 42.17.640(6)	5
Wash. Rev. Code. § 42.17.690	5
Wash. Rev. Code. § 42.17.760	*passim*

MISCELLANEOUS

"Guidelines for Response to *Beck*-Related Public Inquiries," GC Memorandum 01-04 (April 6, 2001)	26

IN THE

Supreme Court of the United States

Nos. 05-1589, 05-1657

GARY DAVENPORT, *et al.*,
Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

On Writs of Certiorari to the Supreme Court of Washington

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and Change to Win (CTW) file this brief *amici curiae* in support of respondent with the consent of the parties as provided for in the Rules of this Court.[1] The AFL-CIO is a federation of 54 national and

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

international labor organizations with a total membership of 10 million working men and women. CTW is a federation of seven national and international labor organizations with a total membership of six million working men and women.

SUMMARY OF ARGUMENT

I. Section 760 of the Washington campaign finance law imposes a precondition on a union's otherwise unfettered right to use its general treasury funds to make political "expenditures" in state elections, and on the union's right to use such funds to make "contributions" to state candidates and other political committees, subject to amount limits that identically apply to all other non-party groups. By its terms and as authoritatively construed by the Supreme Court of Washington, the state's campaign law was adopted in order to prevent corruption and its appearance, but the state eschews a governmental interest in protecting the rights of individuals beyond the constitutional framework set forth in this Court's agency fee jurisprudence.

Washington's campaign law differs substantially from the Federal Election Campaign Act, which absolutely prohibits unions (and corporations) from making expenditures and contributions in federal elections, in part also to prevent corruption and its appearance. Washington's anti-corruption interest is substantially different. That interest does not justify prohibitions or limits on union political expenditures, or Section 760's prior-authorization constraint on them. As for union contributions, Washington's amount limits fully achieve the state's anti-corruption intent, and Section 760 neither furthers that interest directly nor prevents circumvention of the limits.

Section 760 is also fatally under-inclusive in two respects. First, it pertains to a kind of funds received only by unions, and imposes no comparable authorization requirement upon other organizations that are also funded by individuals and groups that do not necessarily support their recipients' politi-

cal expenditures and contributions. Second, Section 760 pertains only to union electoral speech, a content-based restriction that is particularly suspect and that undermines the credibility of the rationale proffered in support of it.

II. This Court has held that agency shop arrangements requiring all union-represented employees to pay either union dues or an agency fee equal to dues is a constitutional means of distributing the costs of representation among the benefited group of employees. To protect against such an arrangement being used to compel support for political or ideological activities unrelated to collective bargaining, this Court has also held that unions may not collect and expend agency fees over the objections of nonmember agency fee payers on activities that are not germane to collective bargaining. In so holding, the Court has repeatedly specified that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."

The Davenport petitioners argue that this Court's repeated statement that "'dissent is not to be presumed' . . . applies only to voluntary union members." Davenport Br. 31. That argument rests on a misunderstanding of the facts of the cases cited in support and of the nature of the agency fee objection right. The Court has never used that phrase in connection with "voluntary union members." What is more, the Court's articulation of the agency fee objection right makes clear that it is a right to avoid compelled subsidization of nongermane union activities by expressing an objection to the union.

ARGUMENT

Section 760 of the Washington Fair Campaign Practices Act provides:

> "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless

affirmatively authorized by the individual." Wash. Rev. Code. § 42.17.760.

As the brief for respondent Washington Education Association (WEA) ably demonstrates, Section 760 is a unique piece of state legislation limiting union political activity in state elections that cannot be justified either as a proper campaign finance regulation or as a proper limitation on the negotiation and enforcement of agency shop agreements. Rather than repeat the arguments advanced by the WEA, we confine ourselves to two points in this brief. First, we show that Section 760 bears no relation to the State of Washington's interests with regard to regulating campaign financing. Second, we show that the attempt of the Davenport petitioners to defend Section 760 as protecting the First Amendment rights of agency shop fee payers rests on a gross misreading of this Court's precedents.

I. SECTION 760 DOES NOT SERVE WASHINGTON STATE'S INTERESTS IN REGULATING CAMPAIGN FINANCES.

A. Section 760 was enacted as part of a comprehensive ballot measure, Initiative Measure 134 ("Initiative 134"), "An Act Relating to the regulation of political contributions and expenditures," that voters in the State of Washington approved in 1992. "Prior to passage of Initiative 134, there were no restrictions on the type of funds a labor organization could use for contributions" or expenditures, *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 140 Wash. 2d 615, 639, 999 P.2d 602, 615 (2000), and there have been no restrictions of any sort on the type of funds any other kind of group may spend politically in Washington elections. In conditioning a union's political use of funds derived from nonmember agency shop fee payers on those nonmembers' prior individual authorization of that

use,[2] Section 760 carved a solitary exception to a campaign finance system that otherwise sanctions the political deployment of private organizational money without regard to its source or the circumstances of its acquisition.

Specifically, except for Section 760, Washington's campaign finance law permits both individuals and groups, including unions, business corporations, non-profit corporations, trade and other associations, state political committees and other organizations, to make unrestricted use of their general treasury funds for election-related "expenditures," subject only to various disclosure and disclaimer requirements. See Wash. Rev. Code §§ 42.17.020(35), 42.17.80-.93, 42.17.100-42.17.120, 42.17.561-42.17.575. And, again except for Section 760, the state's law permits all such groups to use their general treasury funds to make "contributions" to state candidates, political parties and other political committees, subject to near-uniform monetary limits (only political party committees and caucus political committees are exempted) on how much they may contribute to those recipients. See Wash. Rev. Code. §§ 42.17.640(1), (6);[3] *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 140 Wash. 2d at 638, 999 P.2d at 615 (the contribution law "does not distinguish between labor organizations and corporations and treats all donors equally."). For

---

[2] The case at bar does not concern requirements on labor organizations to secure individual authorizations from their *members* before using dues attributable to them for political spending that is otherwise lawfully financed by the organization's general treasury funds.

[3] These contribution limits are inflation-adjusted, see Wash. Rev. Code § 42.17.690, and for the 2006 election cycle were set at $700 per election to candidates for state legislative office, $1,400 per election to candidates for other state offices, $3,500 per year to political party committees, and $700 per year to state legislative caucuses. See Wash. Rev. Code §§ 42.17.640(1), (6). Individuals are subject to the same limits as are groups for contributions to candidates, but they are not limited in their contributions to parties and caucuses. *See id.*

unions, corporations and other groups in Washington, separate segregated political accounts funded with individual voluntary funds are supplemental means for those organizations to engage in state political spending. See Wash. Rev. Code § 42.17.640.

Washington's campaign finance scheme is dramatically different from the regulation of *federal* elections under the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431 *et seq*. Under FECA, unions, business corporations and nonprofit corporations are *prohibited* from using their general treasury funds for electoral expenditures, including express advocacy to the general public of the election or defeat of clearly identified federal candidates, *see* 2 U.S.C. §§ 431 (17), 441b(a), and "electioneering communications," that is, election-proximate candidate-referential broadcasts that are targeted to the referenced candidate's electorate. See 2 U.S.C. §§ 434(f)(3), 441b(b)(2). FECA also prohibits these organizations from using *any* amount of general treasury funds to make contributions to federal candidates, national political party committees and other federal political committees. *See* 2 U.S.C. § 441b(a). Instead, under FECA, separate segregated accounts funded by individual voluntary contributions are the *sole* means for a union or a corporation to raise and direct funds for contributions and expenditures related to federal candidate elections. *See generally* 2 U.S.C. §§ 441b(b)(2)-(4); *McConnell v. Federal Election Commission*, 540 U.S. 93, 203-06 (2003).

The governmental purposes that Initiative 134 was enacted to serve are set forth in Sections 1 and 2 of the measure, which are codified at Wash. Rev. Code §§ 42.17.610, "Findings,"[4] and 42.17.620, "Intent."[5] Initiative 134 was prompted by the following concerns:

---

[4] FINDINGS. The people of the state of Washington find and declare that:

> [T]hat wealth should not lead to a disproportionate or controlling influence over election of candidates; that more candidates were raising funds from special interest groups, leading to a public perception of improper influence by such groups over the decisions of elected officials; and that because more money was being raised from special interest groups, the public perception was created that "individuals have an insignificant role to play in the political process." The intent of the contribution limits in the act were to "[e]nsure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;" to reduce large organizations' influence; and to restore public trust.

Washington State Republican Party v. Washington State Public Disclosure Commission, 141 Wash. 2d 245, 261-62, 4 P.3d 808, 818 (2000). *See also State ex rel. Public Disclosure Commission v. Washington Education Association*, 156 Wash. 2d 543, 556, 130 P.3d 352, 357 (2006); *State ex rel.*

---

(1) The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate or controlling influence on the election of candidates. (2) Rapidly increasing political campaign costs have led many candidates to raise larger percentages of money from special interests with a specific financial stake in matters before state government. This has caused the public perception that decisions of elected officials are being improperly influenced by monetary contributions. (3) Candidates are raising less money in small contributions from individuals and more money from special interests. This has created the public perception that individuals have an insignificant role to play in the political process.

[5] INTENT. By limiting campaign contributions, the people intend to:

(1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes; (2) Reduce the influence of large organizational contributors; and (3) Restore public trust in governmental institutions and the electoral process.

Evergreen Freedom Foundation v. Washington Education Association, 140 Wash. 2d at 638-39, 999 P.2d at 615.

Of special importance to the case at bar, absent from Initiative 134's identification of its governmental interests is any special protection for the political preferences of individuals whose moneys are paid into a union, corporation or other group, including any elevation beyond the well-settled constitutional framework described in Part II below for an individual nonmember to refrain from funding her collective bargaining representative's election-related (and other non-bargaining) spending. "There is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles." *State ex rel. Public Disclosure Commission v. Washington Education Association*, 156 Wash. 2d at 563, 130 P.3d at 361. "[T]he intent of the statute is to protect the public, not individual employees." *Id.* at 556, 130 P.3d at 357. And, because that law unrestrictedly *permits* unions (and corporations) to use their treasury funds to make political expenditures, as well as to make contributions up to certain limits, it "was [not] intended to achieve a similar result" regarding state elections as FECA was intended to achieve regarding federal elections. *See State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 140 Wash. 2d at 631, 999 P.2d at 612.

The Supreme Court of Washington's construction of the intent of Initiative 134 is "authoritative," *see Romer v. Evans*, 517 U.S. 620, 626 (1996), yet the petitioners fail to acknowledge that conclusive and critical finding and instead base their case on the objective specifically eschewed by the state's highest court—that the measure's purpose was to accord extraordinary protections to nonmembers' individual First Amendment rights by replacing the constitutionally sufficient notice and opportunity to object with the prerogative of affirmative authorization. See Brief for Petitioners ("Davenport Br.") 24 (No. 05-1589) ("The rational basis for

enacting § 760 is to ensure that everyone, including unions, has to secure the affirmative authorizing action from outsiders or nonmembers for political funds"); Brief for the Petitioner ("State Br.") 34 (No. 05-1657) ("The opt-in requirement of Section 760 serves an important purpose. It ensures that when the union uses nonmembers' fees to influence an election, this use is in accordance with the wishes of the nonmembers who pay the fees.").[6] But in its defense of its law, the state as litigant in this Court cannot rely upon an interest that did not influence it as the maker of that law. Nor do petitioners claim that Section 760 serves Initiative 134's actual purpose of preventing corruption or its appearance.

The constitutionality of Section 760 must be considered by examining whether it serves the particular purposes that actually undergird Washington's campaign finance law. *See, e.g., Nixon v. Shrink Missouri Government PAC*, 528 U.S. 382, 390 (2000) (upholding Missouri political contribution limits where "Missouri espouses th[e] same interests of preventing corruption and [its] appearance" as underlie FECA's contribution limits). As a matter of fundamental state policy, Washington has made a substantially different assessment about the appropriate role and influence of unions and other institutions in state elections than has the Congress concerning their role and influence in federal elections. Washington does not consider institutional funds to be corrupting when used for political expression, considers institutional funds to be corrupting only when used for contributions beyond certain thresholds, and does not consider the interests of

---

[6] The United States, mischaracterizes the Washington Supreme Court's analysis as simply "recogniz[ing]" that Section 760 serves Initiative 134's fundamental anti-corruption purpose. See Brief for the United States as Amicus Curiae Supporting Petitioner ("U.S. Br.") 13.

individuals or groups who paid into those funds to be implicated by corruption or other concerns.[7]

B. Section 760 imposes a direct restraint on the ability of Washington labor organizations to make "expenditures," including all spending related to candidate and ballot measure[8] elections that is within the reach of the state's campaign finance law (and that is not also a contribution). See Wash. Rev. Code § 42.17.020(22); *cf.* Wash. Rev. Code § 42.17.020(15) (definition of "contribution"). "Expenditures" include "independent expenditures," that is, expenditures by a non-candidate for any "political advertising" that (1) "is made in support of or in opposition to a candidate for office"; (2) is

---

[7] For these reasons alone, the United States, the Campaign Legal Center and other of petitioners' *amici* inaptly equate the respective governmental interests served by the Washington campaign finance law and FECA, which, unlike the Washington law, was enacted in part to protect the prerogatives of individual members, employees and shareholders who might not support the organization's political choices. *See Federal Election Commission v. Beaumont*, 539 U.S. 146, 154-55 (2003); *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 195, 207-08 (1982).

[8] The Washington campaign finance law's regulation of ballot measure activity is another feature that sharply distinguishes that law from FECA, which regulates only partisan elections of federal candidates and does not regulate any process, electoral or otherwise, by which laws are enacted. The record in the case at bar reflects that respondent WEA has engaged only in ballot measure activity among the contributions and public expenditures regulated by the state's campaign finance law. As the WEA explains in its merits brief, ballot measure activities are constitutionally distinguishable from both expenditures and contributions concerning candidate elections, *see generally Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and Section 760's impairment of the WEA's spending on those activities alone warrants that the Court determine that Section 760 cannot be enforced against the WEA. But it is also the case that Section 760 is constitutionally deficient as applied to participation by the WEA and other unions in Washington candidate elections, as we demonstrate here.

not made following a candidate's "encouragement or approval," or with the candidate's "collaborat[ion]"; (3) "specifically names" or otherwise "clearly and beyond any doubt names the candidate"; and (4) has a value of at least $500 either by itself or when added to other such expenditures. Wash Rev. Code § 42.17.020(28). Except as constrained by Section 760, unions, like all other groups in Washington, may use their general treasury funds in Washington without restriction for all political expenditures, including advocacy that supports or opposes particular state candidates.

"[R]estrictions on independent expenditures [in candidate elections] significantly impair the ability of individuals and groups to engage in direct political advocacy and 'represent substantial . . . restraints on the quantity and diversity of political speech.'" *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 578 U.S. 604, 615 (2000), quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Such restrictions are accorded strict scrutiny under the First Amendment and "must be narrowly tailored to serve a compelling governmental interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990).

The Court has deemed the compelling governmental interests that underlie FECA to justify its prohibition of unions (and corporations) from using their general treasury funds for both "express advocacy" and "electioneering communications." *See McConnell v. Federal Election Commission*, 540 U.S. at 205-06. But, since *Buckley*, the Court has recognized no governmental interest justifying expenditure limits because the interest in preventing corruption or its appearance is "adequately addressed by contribution limitations and disclosure requirements." *See Randall v. Sorrell*, 126 S. Ct. 2479, 2488 (2006) (collecting cases).

Again, that is the sole governmental interest that underlies Initiative 134. Yet Washington, unlike the Congress, has determined that this interest does *not* warrant any restriction

on union or other group political advocacy. Thus, Section 760's restraint on a union's political expenditure of funds that are lawfully in its possession is no more relevant to preventing corruption or its appearance in Washington than would be a monetary limit on the amount a union could spend on that speech. Not only is Section 760 not narrowly tailored to serve a compelling governmental interest in Washington, it does not serve such an interest at all.

C. As described above, Washington does limit, almost uniformly, the amounts that unions and other groups may contribute to state candidates, political parties and other political committees. Political contribution limits "'implicate fundamental First Amendment interests,' namely, the freedoms of 'political expression' and 'political association'." *Randall v. Sorrell*, 126 S. Ct. at 2491, *quoting Buckley v. Valeo*, 424 U.S. at 15. In particular, limits "restrict 'one aspect of the contributor's freedom of political association,' namely the contributor's ability to support a favored candidate." *Randall*, *id.*, quoting *Buckley*, 424 U.S. at 24. But because contribution limits do not impair First Amendment rights to the same degree as do expenditure limits, they must be "'closely drawn' to match a 'sufficiently important interest'" in order to survive constitutional review. *Randall*, *id.*, quoting *Buckley*, 424 U.S. at 25.

Again, the only interest underlying Washington's campaign finance law is the prevention of corruption and its appearance. But that interest, as in *Randall*, *Nixon* and *Buckley*, is fully served by the statutory contribution limits themselves. By imposing near-uniform caps on what any contributor, whether individual, union, corporation or other entity, may give to any candidate or other political recipient, the state law both restricts the amount of influence that might result from a contribution and informs the general public that no individual or group enjoys an edge over any other in making such contributions. "Under RCW 42.17.640, the

intent to reduce the influence of large organizational contributors is *achieved* by imposition of a maximum contribution limit on all donors." *State ex. rel. Evergreen Freedom Foundation v. Washington Education* Association, 140 Wash. 2d at 638, 999 P.2d at 615 (emphasis added).

In this regard, the Washington campaign finance law matches means to ends in much the same manner as does FECA. In *Buckley v. Valeo*, 424 U.S. at 26-28, the Court upheld FECA's then-$1,000 per-election contribution limit to federal candidates because that restriction served FECA's "primary purpose to limit the actuality and appearance of corruption" by "focus[ing] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *See also Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 388-89. The Court has upheld other FECA contribution limits because they serve the closely related purpose of preventing circumvention of that $1,000 limit. *See California Medical Association v. Federal Election Commission*, 453 U.S. 182, 197-99 (1981) ($5,000 annual limit on contributions by individuals and unincorporated associations to multi-candidate political committees); *Buckley v. Valeo*, 424 U.S. at 35-36 ($25,000 annual limit on individual aggregate contributions to federal recipients); *id.* at 38 ($5,000 annual limit on contributions by political action committees to candidates). *Cf. Federal Election Commission v. Beaumont*, 539 U.S. at 160 (upholding prohibition of contributions by ideological non-profit corporations in part because they are "no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals").

But no related or further anti-corruption interest is served by the distinct requirement imposed by Section 760 that a union secure special permission from the small fraction of those it represents who are not its members before their agency fees may be used in part to contribute within the common statutory limits.

First, whether or not a union's contribution "uses" nonmembers' agency fees, it is the *union* that is contributing in its own name using resources over which it has previously gained lawful possession; the fee payer does not "contribute" under Washington law whether or not he or she has authorized the union to include his or her moneys among those the union uses for contributions. Likewise, any perceived influence secured by a contribution is attributed to the union and not to any individual nonmember, and it is the union, not the nonmember, that undertakes "the undifferentiated, symbolic act of contributing" that conveys "a general expression of support for the candidate and his views. . . ." *Buckley v. Valeo*, 424 U.S. at 20, 21.

Second, Washington does not consider that any *component* of a union's or other organization's funds has any more corruptive potential than does any other component that, by some method of accounting, might be said to be used for contributions. Indeed, Section 760 could hardly be characterized as preventing "circumvention" by individual nonmembers of their own political contribution limits.[9]

---

[9] In fact, Section 760 could be construed, however perversely, as *facilitating* such circumvention insofar as it prompts nonmembers to approve the union's use of their fees to make contributions to recipients to whom those nonmembers might otherwise contribute directly. Nonetheless, Washington campaign finance law does *not* treat a union's contribution as the contribution also by any nonmember who authorizes the union to use his or her agency fees for that spending. Again, that law reposes on the union full responsibility for the contribution.

Accordingly, Section 760's restriction of a union's ability to contribute its general treasury funds to political recipients does not serve the state's anti-corruption purpose.

4. That Section 760 falls uniquely on labor organizations further severely undermines its credibility and utility in serving either the state's anti-corruption purpose or even the individual-rights purpose asserted by the petitioners. Washington does not treat union treasury funds, when used for contributions, as having any greater potential to corrupt than other groups' funds. Innumerable other organizations in Washington amass their treasuries, in whole or in part, from sources such as commercial transactions, investments, contributions (either for general or unarticulated uses), dues, fees and stock purchases. Yet the state does not in any manner restrict how other "persons"—including any "partnership, joint venture, public or private corporation, association, . . . or political committee . . . or any other organization or group, however organized," Wash. Rev. Code § 42.17.020(35)—may make political expenditures or contributions in state elections with their lawfully accumulated treasury funds.

Like nonmember agency fee payers, these sources may include groups and individuals "who have paid money into a corporation or union for purposes other than the support of candidates . . . to whom they may be opposed." *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 208. Indeed, shareholders of corporations and corporate members of trade associations in particular have strong economic disincentives to terminate their voluntary affiliations with those groups even when they disagree with their organization's political choices, *Austin v. Michigan Chamber of Commerce*, 494 U.S. at 663, yet Section 760 confers no affirmative-authorization prerogative upon them. And, a corporation's general treasury is *less* reflective of its constituents' views than is that of a union precisely because of the objection procedure to which agency fee payers are

entitled. *See id.* at 666. No justification appears why nonmembers of unions alone are accorded the special and constraining prerogative to dictate *at the outset* whether or not the organization may apply their moneys to political uses.

Moreover, Section 760 is under-inclusive and therefore constitutionally deficient in another important respect: it targets only the *electoral* spending of unions, just one of the categories of union spending that are subject to an agency fee payer's established right to object. "The fact that a particular kind of [union] spending has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting [nonmembers of unions.] It suggests instead that the [state] may have been concerned with silencing [unions] on a particular subject." *First National Bank of Boston v. Bellotti*, 435 U.S. at 793. Such content-based restrictions on speech are particularly suspect under the First Amendment, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), and "diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). Section 760 is grossly under-inclusive, and the petitioners' *post hoc* justifications for it should be accorded no constitutional force.

II. SECTION 760 DOES NOT PROTECT THE FIRST AMENDMENT RIGHTS OF AGENCY SHOP FEE PAYERS.

In labor relations systems providing that groups of employees may select a union as the group's exclusive representative, it is common to also provide for the negotiation of "an 'agency shop' arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues." *Abood v. Detroit Board of Education*, 431 U.S. 209, 211 (1977). Such an "arrangement has been thought to distribute fairly the cost of

[the union's] activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222.

In deference to the nonmember's First Amendment right not to be compelled to contribute to political and ideological speech, this Court has developed an agency fee objection jurisprudence that "allows unions to collect [agency fees] and expend [those] funds *over the objection of nonmembers* only to the extent they are used for collective bargaining, contract administration, and grievance adjustment activities." *Marquez v. Screen Actors Guild*, 525 U.S. 33, 36 (1998) (emphasis added). In articulating this body of law, the Court has made clear that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Machinists v. Street*, 367 U.S. 740, 774 (1961). *See also Railway Clerks v. Allen*, 373 U.S. 113, 119 (1963); *Abood*, 431 U.S. at 238.

In stating their arguments in the instant case, the Davenport petitioners make a major point of insisting that this Court's statement in *Street*, *Allen* and *Abood* that "'dissent is not to be presumed' . . . applies only to voluntary union members" and not to nonmember fee payers, and they ask the Court to "clarify that nonmembers need not affirmatively object to paying the political and other nonbargaining portion of the compelled fees." Davenport Br. 31 (capitalized as heading in original) & 38.[10] As we show in the argument below, the Davenport petitioners' reading of this Court's decisions rests on a plain misunderstanding of the facts in the cases they cite and on a basic misunderstanding of the nature of the objection

---

[10] The State of Washington acknowledges that "nonmembers are required to object in order to claim First Amendment protection, and 'dissent is not to be presumed.'" State Br. 29. *See also* U.S. Br. 29 n. 8.

right. Their request for this Court to overrule this basic aspect of its agency fee objector jurisprudence should therefore be denied.

A. The Davenport petitioners characterize *Street* as "a class action in which the state court certified a mixed class of both union members and nonmembers threatened with discharge for not joining the union." Davenport Br. 32. Be that as it may, the plaintiff class did not include any "voluntary union members," and none of the named plaintiffs purported to represent a class of voluntary members. The "members" included in the plaintiff class were "employees of the railroad defendants who similarly have been compelled by the union shop agreement, against their wishes, to become members of the defendant labor union organizations in order to maintain their employment." *Machinists v. Street*, 215 Ga. 27, 108 S.E.2d 796, 805 (1959). Immediately after describing the plaintiff class represented by the named plaintiffs, the state court described the voluntary members as comprising a defendant class represented by the unions and their officers: "The individual defendants and labor organization defendants *represent all members of said labor organizations defendants*." *Id.* at 802 (emphasis added). Thus, this Court's statement in *Street* that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee," 367 U.S. at 774, certainly had nothing to do with "voluntary union members."

This understanding of *Street* is confirmed by *Railway Clerks v. Allen*, *supra*, which was decided only two years later. The complaint in *Allen* alleged that the plaintiffs "[we]re not members of, and [we]re unwilling to join, any of [the] defendant Unions." *Allen v. Southern Railway Co.*, 249 N.C. 491, 107 S.E.2d 125, 125(1959). This Court recognized that the *Allen* plaintiffs "were not union members" when the union security agreement became effective and "refused to pay any part of the moneys required under the Agreement." 373 U.S.

at 116.[11] At trial, "[t]hirteen plaintiffs testified" that "[t]hey were unwilling to join the union" and that "they opposed the use by the union of any of their money (a) for the support or defeat of political candidates and (b) for the support or defeat of legislation." 107 S.E.2d at 127. This Court, relying on *Street*'s statement that "dissent is not to be presumed," held that of the plaintiffs who had not so testified concerning their objections, "[n]o [one] who does not in the course of the further proceedings in this case prove that he objects to [the political] use [of his fees] will be entitled to relief." 373 U.S. at 119. It thus could not be clearer that nonmembers must affirmatively state their dissent in order to be entitled to restrict the union's use of their agency fee payments under *Street*.

The Davenport plaintiffs are equally wrong in their assertion that *Abood v. Detroit Board of Education, supra*, "included [as plaintiffs] both union members who objected to supporting the union's political and ideological activities and nonmembers who also objected." Davenport Br. 33. The *Abood* plaintiffs consisted *only* of *non*member agency fee payers. The *Abood* case originated as two separate lawsuits that were consolidated by the Michigan Court of Appeals. *Abood v. Detroit Board of Education*, 60 Mich. App. 92, 230 N.W.2d 322, 324 (1975). The complaint in *Warczak v. Detroit Board of Education* alleged that the plaintiffs were "unwilling or had refused to pay dues." 431 U.S. at 212. And, the *Warczak* complaint "[n]amed *as defendants . . . all teachers who are members of the [union]*." 230 N.W.2d at 323 (emphasis added). The separate complaint filed as *Abood v. Detroit Board of Education* affirmatively alleged that the "Plaintiffs have *not* become members of the Detroit Federa-

---

[11] The union security clause at issue in *Allen* had not been applied to require "that employees actually join the union," rather "payment of the uniform exactions required by the Agreement [was treated] as complete compliance therewith." 373 U.S. at 116 n. 2.

tion of Teachers." *Abood v. Detroit Board of Education*, U.S. Sup. Ct. No. 75-1153, Appendix p. 46 (emphasis added).

In their attempt to show that the *Abood* plaintiffs included "union members," the Davenport petitioners cite a footnote in which the *Abood* Court describes "[s]ome of the plaintiffs" in *Warczak* as "Union members [who] were paying agency-shop fees under protest" and "others" as having "joined the Union and paid the fees without any apparent protest." 431 U.S. at 212-13 n. 2. It is clear in context that the Court was referring to "'financial' membership" by which "an employee is a 'member' of the union only in the most limited sense." *Pattern Makers v. NLRB*, 473 U.S. 95, 106 n. 16 (1985). The paragraph to which this footnote is appended notes that the *Warczak* complaint alleges that agency shop fees are expended on "social activities for the benefit of [union] members which are not available to [them as] *non*-members" and on other "activities and programs . . . in which they will have no voice." 431 U.S. at 213 (emphasis added). And, the Court later remarked that "the agency shop before us does not impose th[e] additional requirement" "that each employee formally join the union" and only "require[s] financial support for the union." *Id.* at 218 n. 10. Indeed, the fact that the *Warczak* complaint "[n]amed *as defendants . . . all teachers who are members of the* [*union*]," 230 N.W.2d at 323 (emphasis added), conclusively demonstrates that the plaintiffs were *not* members.

In *Abood*, the Michigan Court of Appeals concluded that an "employee[] who [is] forced to contribute service fees to a collective bargaining representative . . . must make known to the union those causes and candidates to which he objects" in order to avoid financing those activities. 230 N.W.2d at 327. And, the court of appeals dismissed the complaint on the ground that "the plaintiffs made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object." *Ibid.* This Court,

while reversing the lower court's "holding that as a prerequisite to any relief each [plaintiff] must indicate to the Union the specific expenditures to which he objects," went on to hold on the basis of *Allen* that "the employees here *indicated . . . that they opposed ideological expenditures* of any sort that are unrelated to collective bargaining." 431 U.S. at 241 (emphasis added).[12]

In sum, *Street*, *Allen*, and *Abood* all stand for the proposition that "dissent is not to be presumed" among nonmember agency fee payers.

---

[12] The Davenport petitioners do correctly describe two of the agency fee cases they cite in this regard, but neither case advances their point.

First, the Davenport petitioners state that some of the plaintiffs in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), were union members. Davenport Br. 33 citing 466 U.S. at 439 n. 2. However, those *Ellis* plaintiffs alleged that they had "*unwillingly* joined [the union] to comply with a union shop agreement." *Ellis v. Railway Clerks*, 685 F.2d 1065, 1067 n. 2 (9th Cir. 1982) (emphasis added). They were, thus, *not* "voluntary union members." Davenport Br. 31.

Second, the Davenport petitioners assert that in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), "there was no need for nonmembers to 'dissent' within the meaning of *Street*," because "the collective bargaining statute and agreement in *Hudson* authorized the public employer to exact from nonmembers' wages only the 'proportionate share of the costs of the collective bargaining process and contract administration,' not full union dues." Davenport Br. 34 quoting 475 U.S. at 295 n. 1. But the *Hudson* situation—where the governing law provides for the payment of a limited agency fee geared to the union's expenditures that are germane to collective bargaining – has nothing to do with the situation presented in *Street*, *Allen* and *Abood* where the governing law provides for the payment of an agency fee equal to union dues as a general matter and the Court has added that such agency shop arrangements "allow[] unions to collect [agency fees] and expend [those] funds *over the objection of nonmembers* only to the extent they are used for collective bargaining, contract administration, and grievance adjustment activities." *Marquez*, 525 U.S. at 36 (emphasis added).

B. The Court's repeated specification that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee," *Street*, 367 U.S. at 774, is not—as the Davenport petitioners seem to think—merely an attempt to reflect the most probable sentiment of the typical nonmember agency fee payer. Rather, the requirement that "dissent . . . must affirmatively be made known to the union by the dissenting employee" goes to the very nature of the right at issue.

In *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 235 (1953), the Court held that union security agreements are constitutional so long as "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining" and that "[n]o more precise allocation of union overhead to individual members [is] necessary" than to require of all represented employees the payment of an amount equal to "'periodic dues, initiation fees, and assessments'" paid by union members. The *Hanson* Court cautioned, however, that "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, [its] judgment will not prejudice the decision in that case." *Id.* at 238.

In *Street*, "[t]he record [was] adequate squarely to present the constitutional questions reserved in *Hanson*." 367 U.S. at 749. In order to avoid deciding these "constitutional questions of the utmost gravity," the *Street* Court construed the Railway Labor Act to "den[y] the authority to a union, over the employee's objection, to spend his money for political causes which he opposes." *Ibid.*

The *Street* Court emphasized that its limiting construction rested squarely on the Railway Labor Act's "safeguarding of rights of dissent." 367 U.S. at 765 (capitalized heading in original). Noting that "Congress incorporated safeguards in the statute to protect dissenters' interests," the Court found

that "[a] congressional concern over possible impingement on the interests of individual dissenters from union policies is therefore discernible." *Id.* at 765-66. And, the Court concluded that it would "respect this congressional purpose [to] construe § 2, Eleventh as . . . denying the unions the rights, over the employee's objection, to use his money to support political causes which he opposes." *Id.* at 768. Because "[t]he safeguards of § 2, Eleventh were added for the protection of dissenters' interests," the Court made clear that any remedies under that section "would be properly granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." *Id.* at 774. It was in this regard that the Court emphasized "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Ibid.*

In *Abood v. Detroit Board of Education*, *supra*, the Court considered whether "an 'agency shop' arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues . . . violates the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees." 431 U.S. at 211.

The *Abood* Court began by observing that the decisions in *Hanson* and *Street* "on their face go far toward resolving the[se] issues." 431 U.S. at 217. Addressing the first issue, i.e., whether the agency shop "violates the constitutional rights of government employees who object to public-sector unions as such," *id.* at 211, the Court held that "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this

Court [i.e., *Hanson* and *Street*,] appear to require validation of the agency-shop agreement before us," *id.* at 225-26.

Addressing the second issue, the *Abood* Court held that nonmembers "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative" but that "the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by *employees who do not object to advancing those ideas*." 431 U.S. at 234 & 235-36 (emphasis added). And, in "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto," the *Abood* Court closely followed *Street* and *Allen*, expressly endorsing their basic proposition "that 'dissent is not to be presumed' and that only employees who have affirmatively made known to the union their opposition to political uses of their funds are entitled to relief." *Id.* at 237 & 238.

In sum, the *Street/Abood* line of cases prevents "the exaction of dues, initiation fees, or assessments" from being "used as a cover for *forcing* ideological conformity . . . in contravention of the First Amendment," *Hanson*, 351 U.S. at 238 (emphasis added), by "den[ying] the authority to a union, *over the employee's objection*, to spend his money for political causes which he opposes," *Street*, 367 U.S. at 749 (emphasis added). These cases are thus concerned precisely with "safeguard[ing] [the] right[] of dissent." *Street*, 367 U.S. at 765, and protect "only employees who have affirmatively made known to the union their opposition to political uses of their funds," *Abood*, 431 U.S. at 238. *See Communications Workers v. Beck*, 487 U.S. 735, 746 (1988) ("[*Street*] held that § 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes."); *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990) ("*Abood* held that a union could not

expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining.").

C. We would add that there are reasons that a union-represented employee might refrain from becoming a union member other than opposition to the union's activities that are not germane to collective bargaining.

The most likely reason is that joining the union entails a commitment to actively support the union's efforts that goes far beyond the passive payment of agency shop fees. In particular, an employee who "formally . . . join[s] a union . . . subject[s] himself to its discipline" during the period of membership and can be fined for breaking the union's rules. *Pattern Makers*, 473 U.S. at 106. Moreover, the act of formally joining in itself demonstrates a commitment to the union's cause that the employee might reasonably fear would be viewed as disloyal by his or her employer.

There is very little reason to think that an employee who does not state an objection opposes the vast majority of union activities that are not germane to collective bargaining. For instance, a non-objecting fee payer is at least as likely to support as he or she is to oppose the WEA's efforts to pass tax levies needed to fund schools at which WEA-represented teachers work as well as WEA's opposition to school voucher and charter school initiatives that would drain resources away from WEA-represented schools. And, it is difficult to see why any WEA-represented teachers would oppose the union's support of initiatives to reduce class size and to provide cost-of-living adjustments in the wages of education employees.

The agency fee objector law developed under *Street* and its progeny requires unions to inform nonmember agency fee payers of their right to object. *See Marquez v. Screen Actors Guild*, 525 U.S. at 43. And, elaborate rules have been developed concerning the information that must be conveyed

to explain this right and the method by which unions handle objections. *See* "Guidelines for Response to *Beck*-Related Public Inquiries," GC Memorandum 01-04 (April 6, 2001), available at www.NLRB.gov. Given these rules, the more likely explanation for a nonmember's failure to take the simple step of lodging an objection to a union's nongermane expenditures is that many of those expenditures, although not chargeable to objectors under the precedents, nevertheless further the employment-related interests of the represented employees. *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (holding "lobbying activities relate[d] . . . to financial support of the employee's profession or of public employees generally" to be nonchargeable to objecting fee payers).

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

JONATHAN P. HIATT
LAURENCE E. GOLD
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

PATRICK J. SZYMANSKI
1900 L Street NW
Washington, DC 20036

6266

Nos. 05-1589 & 05-1657

In the Supreme Court of the United States

GUY DAVENPORT, ET AL.

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION

Respondent.

WASHINGTON

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

EUGENE VOLOKH
UCLA Law School
405 Hilgard Avenue
Los Angeles, California 90095
(310) 206-3926

DONALD M. FALK
Counsel of Record
Mayer, Brown, Rowe & Maw LLP
Two Palo Alto Square, Suite 300
Palo Alto, California 94306
(650) 331-2000

Counsel for Amicus Curiae American Legislative Exchange Council

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the First Amendment bars a State from requiring a union that has been empowered by state law to exact agency fees from nonmembers first to obtain those nonmembers' affirmative authorization before spending their fees on election-related political activity.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

A. Section 760 Regulates Only How Unions Spend Other People's Money 4

B. This Case Presents No Genuine Conflict Between Constitutional Rights 5

1. The Union and Its Members Have No Constitutional Right To Spend Nonmembers' Money Without Affirmative Authorization 6

2. Union Nonmembers Have No Constitutional "Right" To Have Their Money Spent Without Their Approval 8

C. Section 760 Falls Comfortably Within The Scope Of State Legislative Discretion 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977) ..... *passim*

Austin v. *Mich. Chamber of Commerce*, 494 U.S. 652 (1990) 10

Boy Scouts of America v. *Dale*, 530 U.S. 640 (2000) 7

Cammarano v. *United States*, 358 U.S. 498 (1959) 11

Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989) 10

Chicago Teachers Union, Local No. 1 v. *Hudson*, 475 U.S. 292 (1986) 3, 6

Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 9

Ellis v. *Brotherhood of Railway Clerks*, 466 U.S. 435 (1984) 6, 7, 10

Hudgens v. *NLRB*, 424 U.S. 507 (1976) 10

International Ass'n of Machinists v. *Street*, 367 U.S. 740 (1961) 5, 8, 9

Locke v. *Davey*, 540 U.S. 712 (2004) 6, 9

Regan v. *Taxation With Representation*, 461 U.S. 540 (1983) 11

Rosenberger v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) 6

State of Washington ex rel. Washington State Public Disclosure Comm'n v. *Washington Education Ass'n*, 130 P.3d 352 (2006) 7, 8

Texas Monthly, Inc. v. *Bullock*, 489 U.S. 1 (1989) 6

TABLE OF AUTHORITIES—continued

Page(s)

CASES

Thomas v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981) 6

Walz v. *Tax Comm'n*, 397 U.S. 664 (1970) 6

STATUTES, RULES AND REGULATIONS

26 U.S.C. § 501(c)(3) 11

45 U.S.C. § 152 8

Rev. Code Wash. § 41.59.100 4

Rev. Code Wash. § 41.56.122 4

Rev. Code Wash. § 42.17.760 ..... *passim*

BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The American Legislative Exchange Council (ALEC) is the Nation's largest individual membership association of state legislators, with more than 2,400 members. ALEC's mission is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a nonpartisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government, and the general public.[1]

ALEC and its members have an acute interest in this case because of its federalism implications. ALEC has created Task Forces that draft model legislation in a wide variety of fields to advance the principles outlined above. In particular, ALEC Task Forces have approved several model bills that are designed to protect the First Amendment rights of workers represented by labor organizations. These include the Employee Rights Reform Act, the Public Employee Freedom Act, the Prohibition on Compensation Deductions Act, the Prohibition of Negative Check-off Act, the Voluntary Contributions Act, and the Political Funding Reform Act. These bills address their goals through a variety of approaches, including opt-in mechanisms similar to the one at issue in this case, as well as other procedural safeguards aimed at transparency and promptness that exceed the minimums stated in this Court's decisions.

---

[1] Pursuant to Rule 37.6, *amicus* ALEC affirms that no counsel for a party author[illegible] brief in whole or in part and that no person other than *amic*[illegible]nd its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

In addition, ALEC Task Forces are active in many legislative areas besides labor regulation in which constitutional constraints may be implicated directly or indirectly. Among the affected Task Forces are those for Civil Justice, Criminal Justice, and Telecommunications & Information Technology. In these and other fields, state legislators routinely address subject matter covered by this Court's precedents, not only under the First Amendment, but under provisions ranging from the Due Process Clause to the Fourth Amendment to the Commerce Clause.

The decision in this case may determine the permissible scope of judicially imposed constraints on legislative freedom of action in the States, including any limitations on state laws designed to protect federal constitutional rights. The state legislators who craft and then seek to enact ALEC's model legislation have a particularly strong interest in ensuring that misapprehensions of federal constitutional principles do not unduly constrain state legislation that is designed to advance individual freedom.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about federalism as well as free speech. Can a State that provides for union security contracts also impose innovative conditions that protect the expressive rights of nonmembers who are coerced into paying a union to represent them? Under a federal system, it surely can. The decision below, which struck down such a provision, rests on a distorted view of the First Amendment that undervalues the ability of states to innovate within our federal system.

Different states have implemented different ideas about the proper balance between union power and the rights of nonmembers who work within bargaining units represented by unions. Some states have chosen to enact right-to-work legislation that precludes any collection of compulsory union fees from nonmembers. Others have chosen to allow these fees but provide an opt-out from political or ideological ex-

penditures, the minimum that the First Amendment requires. See *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292 (1986); *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). And some states, like Washington, have chosen to allow the fees but provide an opt-in remedy instead. This Court should not constrain state lawmakers by taking the opt-in solution off the table.

Nothing in the opt-in statute challenged here (Rev. Code Wash. § 42.17.760 ("Section 760")) affects how a union may spend its *members'* money. But because Washington state law authorizes union security contracts, a union such as respondent Washington Education Association (WEA) may force employees who do *not* belong to it to pay an "agency shop fee" to cover the union's costs of serving as the nonmembers' bargaining agent. Employees who voluntarily join a union have made the choice to provide at least financial support to the union's full range of activities. A nonmember whom state law forces to pay a union to serve as her bargaining agent has made no such choice.

Thus, all that Section 760 limits is the power of a voluntary association of *some* employees to spend *other* people's money for election-related purposes. A State has considerable discretion to impose such limits, discretion that the decision below failed to recognize.

This Court's decisions in *Hudson* and *Abood* clearly outline the *minimum* a union must do to protect nonmembers' rights. The union must provide nonmembers with an opt-out system with additional procedural safeguards.

But the constitutional minimum that lawmakers *must* do to protect rights only rarely defines the maximum that lawmakers *may* do to protect those rights. This Court has repeatedly emphasized the need for "play in the joints" even where two genuine constitutional constraints may nearly abut. Here, though, we have a real constitutional right—the right not to be coerced into funding a union's electioneer-

ing—abutting a nonexistent one, the supposed right of the union to electioneer using nonmembers' coercively extracted money. Section 760 protects the real right, and thus falls well within the range of permissible state discretion.

ARGUMENT

This Court Should Not Unduly Constrain State Lawmakers' Discretion To Promote Legitimate First Amendment Interests.

Washington law provides the means for a union to forcibly extract money from nonmembers. To limit the burden this scheme imposes on nonmembers, Washington mandates that the money cannot be used for election-related purposes unless the nonmembers expressly opt in. In striking down this sensible limitation, the Supreme Court of Washington relied on an illusory associational right to spend money extracted from forced contributors. Equally misguided was the lower court's disregard for the State's legitimate power to limit the scope and uses of the union contributions that state law compels nonmembers to pay. This Court should enunciate the correct First Amendment principles at issue here and confirm that the State acted well within its discretion to protect its public employees against compelled political speech.

A. Section 760 Regulates Only How Unions Spend Other People's Money.

The WEA is the exclusive bargaining agent for about 70,000 public employees in Washington. Of those, about 5% have deliberately chosen not to join the WEA.

Nonetheless, under Washington law, these 3500 nonmembers must pay the WEA "agency shop fees" that are intended to cover the costs related to collective bargaining, an activity that benefits non-members as well as members. Rev. Code Wash. §§ 41.59.100, 41.56.122; see *Abood*, 431 U.S. at 222, 224 (discussing "free rider" problem created when nonmembers do not pay for their own representation in bargaining). The WEA's ability to compel payment of these agency

shop fees derives entirely from state law. Without such a law, the WEA could not compel any type of contribution by public employees who do not wish to join it.

Standing alone, the authorization for the agency shop would permit a union to

> take[] a part of the earnings of some * * * and turn[] it over to others, who spend a substantial part of the funds so received in efforts to thwart the political, economic and ideological hopes of those whose money has been forced from them under authority of law.

International Ass'n of Machinists v. *Street*, 367 U.S. 740, 789 (1961) (Black, J., dissenting).

But Washington law balances the compulsion to contribute agency shop fees with safeguards to ensure that public employee unions cannot use those compelled contributions for political, nonbargaining activity unless the contributing nonmembers agree. Section 760 protects the nonmembers by providing that, before a union uses those fees to influence an election or to operate a political committee, it must get the nonmembers' affirmative authorization. The union of course remains free to spend without hindrance every penny of its *members'* dues, plus that portion of the agency shop fees *not* devoted to the excluded political activity.

B. This Case Presents No Genuine Conflict Between Constitutional Rights.

The decision below dramatically constrains state choice by holding that the opt-out solution is the only constitutionally permissible one—that it is both a floor and a ceiling. That rigidity wrongly straitjackets state lawmakers (in this instance, state voters enacting initiatives).

There are, it is true, some areas of constitutional law where constitutional constraints leave lawmakers very little room for discretion. Public universities, for instance, may neither give special preference to religious newspapers nor

discriminate against them. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989); *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); see also *Locke* v. *Davey*, 540 U.S. 712, 728–729 (2004) (Scalia, J., dissenting).

But before creating such a zone of lawmaker powerlessness in a different area of the law, courts should be sure that the constitutional constraints pressing on lawmakers from both sides are genuine, not fictitious.[2] Here, the non-union-members have a genuine First Amendment right not to have their money used for political causes with which they disagree. The Court has repeatedly and unanimously reaffirmed this right in *Abood*, *Hudson*, and *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435 (1984). On the other hand, any rival right on the union's part is entirely illusory.

1. The Union and Its Members Have No Constitutional Right To Spend Nonmembers' Money Without Affirmative Authorization.

A union, like any expressive association, has the right to fund political expression out of dues paid by voluntary members and contributions affirmatively authorized by nonmembers. But no association has a First Amendment right to fund election advocacy using money that was coercively extracted from nonmembers who have not affirmatively authorized its expenditure for that purpose. No case from this Court even

---

[2] *Cf., e.g.*, *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 722 (1981) (Rehnquist, J., dissenting) (criticizing then-existing "tension" between the Free Exercise Clause and the Establishment Clause—tension that often left legislatures with little room to maneuver between the constraints of the two Clauses—on the grounds that it was "largely of this Court's own making"); *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970) (noting "general principle" that "there is room for play in the joints" between the constraints of the Establishment Clause and of the Free Exercise Clause); *Locke*, 540 U.S. at 718 (likewise).

hints at any such right, and there is no justification for this Court to create such a right now.

To the contrary, this Court has accurately identified the only genuine First Amendment associational issue implicated by this case: the one that results from "allowing the union shop"—or an agency shop—"at all." *Ellis*, 466 U.S. at 455. *That* is "a significant impingement on First Amendment rights" because "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." *Ibid.*

The Washington Supreme Court thus was mistaken to suggest that "[b]ecause sec. 760 regulates the relationship between the union and agency fee payers with regard to political activity, the analysis [from *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000)] should be applied here." 130 P.3d at 362 (¶ 50). Section 760 regulates the relationship between the union and its nonmembers only in the sense that it embodies the traditional principle that an association can engage in electioneering only using money voluntarily paid to it. *Dale* would have been on point only if the Boy Scouts had claimed some right to take *non*members' money unless the nonmembers affirmatively objected. In fact, however, the Boy Scouts in *Dale* were interested in *limiting* membership—in avoiding forced association—rather than taking money forcibly extracted from nonmembers. *Dale* accordingly says nothing about this case.

Nor are union members' First Amendment rights violated simply because Section 760 requires the union to bear the cost of getting affirmative authorization, as the Washington court believed. See 130 P.3d at 359–360 (¶¶ 37, 38). The majority's "interest in stating its views without being silenced by the dissenters" may preclude an injunction against all political activity by a union that extracts funds from nonmembers. *Street*, 367 U.S. at 773 (suggesting that such an injunction "might" violate the First Amendment). But nothing in Section 760 stops the WEA from speaking through the

use of its members' funds; the statute at most raises the cost of using *non*members' money for *non*bargaining activity. It might be cheaper for members to take nonmembers' money and spend it for electioneering unless the nonmembers expressly opt out of this practice, and more expensive to ask the nonmembers first to opt in. But that's a cost savings that the First Amendment does not guarantee.

2. Union Nonmembers Have No Constitutional "Right" To Have Their Money Spent Without Their Approval.

Equally unfounded is the suggestion that the Washington law's protection of nonmembers "violates the First Amendment rights of nonmembers" themselves. 130 P.3d at 360 (¶ 39). Surely "there are numerous and varied reasons why employees choose not to join a union" (*ibid.*), just as there are varied reasons why citizens choose not to join the ACLU or the NRA. No one, however, would say that "[a] presumption of dissent" (*ibid.*)—which is to say a presumption that nonmembers of those groups don't want to contribute to those groups unless they affirmatively authorize the contribution—"violates the First Amendment rights of nonmembers."

This Court has concluded, in interpreting the Railway Labor Act, that under that particular Act "dissent is not to be presumed." *Street*, 367 U.S. at 774 (construing 45 U.S.C. § 152, Eleventh). But nothing in *Street* or any other decision suggests that *no* legislative body has the power to presume nonmembers' dissent under an entirely different statutory scheme, such as that authorizing the collection of agency shop fees under Washington law.

The First Amendment operates here only to protect dissenters' rights not to have the state force them to fund political or ideological speech. No real First Amendment interest constrains states' ability to protect those rights by going beyond the opt-out system that is the bare constitutional mini-

mum, and instead insisting on an opt-in system that is more protective of individual freedom.

C. Section 760 Falls Comfortably Within The Scope Of State Legislative Discretion.

Although a majority of this Court has yet to hold that a "[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the *risk* that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining," neither has the Court "foreclose[d] the argument." *Abood*, 431 U.S. at 244 (Stevens, J., concurring) (emphasis added). Much less has the Court even hinted that the First Amendment forecloses a statutory system that *does* "avoid the risk" that nonmember funds will be used to finance nonbargaining activity without the nonmembers' consent.

Even where two constitutional rights pull in opposite directions, as at the intersection of the Free Exercise and Establishment Clauses, there remains considerable "room for play in the joints." *Locke*, 540 U.S. at 718. See also *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005) (noting that there is a "corridor between the Religion Clauses"). That flexibility, the Court has held, permits Congress "to accord religious exercise heightened protection from government-imposed burdens." *Cutter*, 544 U.S. at 714. Surely a state government may likewise accord individual public employees the same "heightened protection" from the "government-imposed burdens" that otherwise would result if the employees' forcibly extracted agency shop fees were used for electioneering.

Here the proper "play in the joints" is particularly great. The only legitimate interest weighing against giving nonmembers the utmost ability to prevent the expenditure of forced agency shop fees for political purposes without their consent is the government interest behind the agency shop itself. See *Ellis*, 466 U.S. at 456 ("union shop" context).

Unless state law compelled nonmembers to pay agency shop fees, this case would not exist, as only the voluntary dues of union members would be at issue. Here, however, Washington has decided that its interest in preserving the agency shop did not reach far enough to justify the use of nonmembers' compelled payments for political purposes without the nonmembers' express consent. Nothing compelled Washington to allow unions to force payment of agency shop fees at all. Washington surely has the leeway to limit the use of those fees in the way it has here.

Section 760 puts the WEA in no worse a position than the one in which many other expressive associations constantly operate. The ACLU, the Sierra Club, the NRA, and the Republican Party, among others, likewise subsist on member dues, coupled with contributions affirmatively authorized by nonmembers. Yet these organizations' inability to forcibly collect funds for electioneering from nonmembers without the nonmembers' express permission is entirely consistent with the First Amendment.[3] No one has the "right to spend another person's money" to further one's own exercise of a constitutional right. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 626 (1989) (Sixth Amendment does not encompass right to use others' funds to pay for counsel, "even if those funds are the only way that that defendant will be able to retain the attorney of his choice").

Like other unions that benefit from state laws permitting union security provisions, the WEA is actually far better off than nonunion expressive groups: The government forces

[3] See *Hudgens* v. *NLRB*, 424 U.S. 507 (1976) (holding that speakers generally have no First Amendment rights to use others' private property, even for their political speech); *Austin* v. *Mich. Chamber of Commerce*, 494 U.S. 652, 674 (1989) (Brennan, J., concurring) (arguing that state may protect corporate stockholders from having their assets used against their wishes to support or oppose political candidates, even though the assets were provided with no government coercion).

nonmembers to pay the WEA money that will be used for purposes other than politics. But as to money that would be used for electioneering, the WEA is in the same position as the other associations: It has no right to use nonmembers' money for election-related speech without the nonmembers' permission.

This Court has repeatedly held that the Constitution permits a government to ensure that tax subsidies—which flow from coercively levied taxes—are not used for electioneering.[4] The State of Washington surely has similar flexibility here to ensure that the coercively levied agency shop fee is not used for electioneering, at least without the payer's affirmative authorization. Like a tax, the agency shop fee is extracted under legal compulsion to pay for benefits that reach a defined group (here, the bargaining units that the WEA represents). And, as with a tax, those who are forced to pay the agency shop fee—which is to say those people who have deliberately chosen not to join the union—quite likely wouldn't pay the union any money at all in the absence of government coercion.

Having provided unions with the means to coerce payment of the fee, the State of Washington surely may limit unions' ability to use that fee for electioneering. Unions remain free to get all the electioneering funds they want from members, or from nonmembers who affirmatively approve that use of such funds. And though getting such approval takes time and effort, this is no more than the time and effort all expressive associations must invest to raise political funds.

[4] See, *e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 546 (1983) (upholding the 26 U.S.C. § 501(c)(3) restriction on lobbying using tax-deductible contributions, using logic that would equally justify § 501(c)(3)'s similar restrictions on electioneering using tax-deductible contributions); *Cammarano* v. *United States*, 358 U.S. 498 (1959) (upholding a restriction on the deductibility of business expenses for "the promotion or defeat of legislation," including ballot measures).

Principles of federalism and the First Amendment alike require reversal here.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted.

EUGENE VOLOKH
UCLA Law School
405 Hilgard Avenue
Los Angeles, California
90095
(310) 206-3926

DONALD M. FALK
Counsel of Record
Mayer, Brown, Rowe & Maw LLP
Two Palo Alto Square, Suite 300
Palo Alto, California 94306
(650) 331-2000

Counsel for Amicus Curiae
American Legislative Exchange Council

NOVEMBER 2006

401B

Nos. 05-1589, 05-1657

In The Supreme Court of the United States

GARY DAVENPORT, *et al.*,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF PETITIONERS

TREVOR POTTER
J. GERALD HEBERT
Counsel of Record
PAUL S. RYAN
CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave. NW
Suite 650
Washington, DC 20036
(202) 736-2200

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	1
ARGUMENT	6
I. THIS COURT'S DECISIONS IN *STREET*, *ABOOD*, *ELLIS* AND *HUDSON* ESTABLISH THE *MINIMUM*, NOT THE *MAXIMUM*, FIRST AMENDMENT RIGHTS POSSESSED BY DISSENTING WORKERS	6
II. THIS COURT'S DECISION IN *MCCONNELL* UPHOLDING THE FEDERAL "OPT-IN" REQUIREMENT MAKES CLEAR THAT THE WASHINGTON "OPT-IN" REQUIREMENT IS CONSTITUTIONAL	12
III. THE WASHINGTON SUPREME COURT'S DECISION UNDERMINES STATE "OPT-IN" LAWS THROUGHOUT THE NATION	17
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).....*passim*

Am. Fed'n of Labor v. American Sash & Door Co., 335 U.S. 538 (1949).....3, 6, 7

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)..... 16

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).....4, 6, 7, 9, 11

Ellis v. Brotherhood of Railway, Airline And Steamship Clerks, Freight Handlers, Express And Station Employees, 466 U.S. 435 (1984).....*passim*

Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003)..... 16

Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).....13, 16

Hurley v. Irish-American Gay, Lesbian, & Bisexual Group, 515 U.S. 557 (1995)..... 10

Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961).....*passim*

Keller v. State Bar of Calif., 496 U.S. 1 (1990)..... 10

Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).....3, 6, 7

McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).....*passim*

Mich. State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997)..... 16

Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956)..... 6

TABLE OF AUTHORITIES – Continued

Page

Sanger v. Dennis, No. 06CA1944, 2006 Colo. App. LEXIS 1619 (Colo. Ct. App. Sept. 28, 2006) 5, 18

U.S. v. Automobile Workers, 352 U.S. 567 (1957)..... 13

Wash. v. Wash. Educ. Ass'n, 156 Wash. 2d 543 (Wash. 2006) .....*passim*

CONSTITUTIONS, STATUTES AND LEGISLATION

2 U.S.C. § 434(f)(3)..... 14

2 U.S.C. § 441b.....1, 5, 14, 15, 16

Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002).....13, 14

Hatch Political Activities Act, 53 Stat. 1147 (1939) 12

Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 (1947)..... 13

Alaska Stat. § 15.13.067 17

Alaska Stat. § 15.13.074 17

Alaska Stat. § 15.13.400(8)..... 17

Ariz. Rev. Stat. Ann. § 16-919..... 17

Ariz. Rev. Stat. Ann. § 16-920..... 17

Ariz. Rev. Stat. Ann. § 16-921..... 17

COLO. CONST. art. XXVIII, § 3(4) 17

COLO. CONST. art. XXVIII, § 6(2) 17

Ind. Code Ann. § 3-9-2-4 17

Ind. Code Ann. § 3-9-2-5(b)..... 17

Mich. Comp. Laws Ann. § 169.254(1)..... 17

TABLE OF AUTHORITIES – Continued

Page

Mich. Comp. Laws Ann. § 169.255 17
Mont. Code Ann. § 39-31-402 17
N.C. Gen. Stat. § 163-278.19 17
N.D. Cent. Code § 16.1-08.1-01 17
N.D. Cent. Code § 16.1-08.1-03.3 17
Ohio Rev. Code Ann. § 3517.082 17
Ohio Rev. Code Ann. § 3599.03 17
Ohio Rev. Code Ann. § 3599.031 17
Pa. Stat. Ann. tit. 25, § 3253 17
Pa. Stat. Ann. tit. 43, § 1101.1701 17
R.I. Gen. Laws § 17-25-3(1) 17
R.I. Gen. Laws § 17-25-10.1(h) 17
S.D. Codified Laws § 12-25-1(1) 17
S.D. Codified Laws § 12-25-2 17
Tex. Elec. Code Ann. § 253.094 17
Tex. Elec. Code Ann. § 253.100 17
Wash. Rev. Code § 28B.52.045(2) 2, 3
Wash. Rev. Code § 41.56.122 ..... 2, 3
Wash. Rev. Code § 41.59.100 ..... 2, 3
Wash. Rev. Code § 42.17.760 ..... 2, 11, 17
Wyo. Stat. Ann. § 22-25-102 17

STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization which works in the area of campaign finance law, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding disclosure, political advertising, contribution limits, enforcement issues, and many other matters. In addition to participating as *amicus curiae* in many campaign finance-related cases throughout the nation, the CLC served as counsel to defendant-intervenors Senator John McCain, Senator Russell Feingold, *et al.*, in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) [hereinafter *McConnell*], in this Court. The CLC has a longstanding, demonstrated interest in campaign finance law, and this case directly implicates the CLC's interest.

SUMMARY OF ARGUMENT

Federal law has long prohibited labor unions and corporations from using treasury funds to make political contributions or expenditures in connection with federal elections. *See* 2 U.S.C. § 441b. However, labor unions and corporations are permitted by federal law to establish a "separate segregated fund" (a.k.a. "PAC") into which union members or corporate employees and shareholders may contribute funds (*i.e.*, "opt-in") to financially support a

[1] No counsel for a party authored any part of this brief. No person or other entity other than *amicus* Campaign Legal Center contributed monetarily to the preparation and submission of this brief. Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

union's or corporation's political activities. This Court has stated its "unanimous view" that the federal law separate segregated fund "opt-in" procedure provides unions and corporations with a "constitutionally sufficient" opportunity to engage in political speech. *See McConnell*, 540 U.S. at 203.

By comparison to federal law, Washington state law is less restrictive in several respects regarding labor union political activity. First, unlike federal law, Washington state law permits unions to use treasury funds to make political contributions and expenditures. Second, whereas federal law permits a union's PAC to accept contributions only from its members (not from nonmembers), Washington law allows unions to use the funds of both members and nonmembers for political purposes – provided that nonmembers *affirmatively authorize* the use of their funds for political purposes. *See* Wash. Rev. Code § 42.17.760.[2]

This Washington law, § 42.17.760, which requires union nonmembers to affirmatively consent ("opt-in") before their funds can be used for political purposes, is the subject of this lawsuit. Despite this Court's long line of cases upholding the more restrictive federal "opt-in" law,

---

[2] Washington state law permits unions to include a "union security" provision in collective bargaining agreements – requiring individuals who are not members of the union, but who are part of the collective bargaining unit, to pay an "agency shop fee" to the union to cover the costs of collective bargaining. *See* Wash. Rev. Code §§ 28B.52.045(2), 41.59.100, and 41.56.122. Washington law further provides that "[a] labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless *affirmatively authorized* by the individual." Wash. Rev. Code § 42.17.760 (emphasis added).

the Supreme Court of Washington purportedly relied on this Court's decisions to invalidate the less restrictive state "opt-in" law on First Amendment grounds. The Washington Supreme Court majority opinion "turns the First Amendment on its head" and "distorts [this Court's] cases delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree to do the opposite: limit the State's ability to protect such dissenters." *Wash. v. Wash. Educ. Ass'n*, 156 Wash. 2d 543, 571, 574-75 (Wash. 2006) (Sanders, J., dissenting) [hereinafter *WEA*].

The State of Washington has chosen to confer a *statutory right* on labor unions both to collect "agency shop fees" from nonmembers (*i.e.*, fees to cover the costs of collective bargaining) and to spend union treasury funds to influence state elections. *See* Wash. Rev. Code §§ 28B.52.045(2), 41.56.122 and 41.59.100. Absent this statutory mechanism for compelling payment of fees by nonmembers, a union has no right, constitutional or otherwise, to compel payment of such fees.

The U.S. Constitution does not require that labor unions be permitted to demand fees from nonmember workers as a condition of employment. This Court has upheld state laws prohibiting unions from compelling workers to become members and pay fees as a condition of employment. *See Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) [hereinafter *Lincoln Fed.*]; *Am. Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538 (1949) [hereinafter *American Sash*].

Nor does the U.S. Constitution require that labor unions be permitted to spend treasury funds to influence elections. This Court has upheld the longstanding federal law ban on labor union and corporation use of treasury funds to influence elections – finding that the separate segregated fund "opt-in" provision sufficiently protects a union's constitutional rights. *See McConnell*, 540 U.S. 93, 203-09.

The Supreme Court of Washington conflated Washington unions' statutorily-conferred rights with constitutional rights and invalidated the state law restricting the election-related use of nonmember agency shop fees on the ground that the "opt-in" requirement violates the First Amendment rights of labor unions and their members. *WEA*, 156 Wash. 2d at 571. In so ruling, the Washington Court misconstrued this Court's decisions in *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) [hereinafter *Street*]; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) [hereinafter *Abood*]; *Ellis v. Brotherhood of Railway, Airline And Steamship Clerks, Freight Handlers, Express And Station Employees*, 466 U.S. 435 (1984) [hereinafter *Ellis*]; and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) [hereinafter *Hudson*]. The Washington Court mistakenly interpreted these decisions as establishing the *maximum* First Amendment rights possessed by workers, rather than recognizing these decisions as establishing the *minimum* First Amendment rights possessed by workers.

The Supreme Court of Washington's decision below invalidating Washington's "opt-in" provision misconstrues this Court's decisions in *Street*, *Abood*, *Ellis* and *Hudson*. Further, the decision below directly conflicts with this Court's decision in *McConnell* upholding the "opt-in"

provision of 2 U.S.C. § 441b. Moreover, the Washington Court's decision will undoubtedly be relied upon as persuasive authority in efforts to invalidate "opt-in" laws in a number of other states – in fact, a Colorado appellate court cited the Washington Court's *WEA* decision in September in striking down a Colorado regulatory "opt-in" requirement. *See Sanger v. Dennis*, No. 06CA1944, 2006 Colo. App. LEXIS 1619 (Colo. Ct. App. Sept. 28, 2006).

This Court's decisions in *Street*, *Abood*, *Ellis* and *Hudson* establish the *minimum*, not the *maximum*, First Amendment rights possessed by dissenting workers. The Washington state law "opt-in" requirement is a constitutionally permissible means for the state to further protect the First Amendment rights of dissenting workers to be free from compelled political speech and association. This Court's decision in *McConnell* makes clear that similar federal "opt-in" restrictions do not violate the constitutional rights of unions and their members. Nevertheless, the Washington Court's misconstruction of this Court's decisions has rendered unenforceable Washington's "opt-in" law, and will undermine state "opt-in" laws around the nation. For these reasons, we respectfully urge this Court to reverse the decision of the Supreme Court of Washington.

ARGUMENT

I. THIS COURT'S DECISIONS IN *STREET*, *ABOOD*, *ELLIS* AND *HUDSON* ESTABLISH THE *MINIMUM*, NOT THE *MAXIMUM*, FIRST AMENDMENT RIGHTS POSSESSED BY DISSENTING WORKERS.

This Court has never held that a labor union possesses a constitutional right to demand financial support from nonmembers for any purpose. While some state legislatures have enacted statutes prohibiting unions from compelling workers to become members and pay fees as a condition of employment (so-called "open shop" laws), other legislative bodies have chosen to confer upon unions the statutory right to compel financial support from nonmembers (so-called "agency shop" laws).

Laws of both types – "open shop" laws and "agency shop" laws – have been challenged before this Court on constitutional grounds. The Court has upheld the constitutionality of "open shop" laws prohibiting compelled union membership. *See Lincoln Fed.*, 335 U.S. at 531 ("There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies."); *see also American Sash*, 335 U.S. 538, 540 (applying reasoning of *Lincoln Fed.* in upholding Arizona "open shop" law); *see also Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 233 (1956) [hereinafter *Hanson*] (upholding federal "closed shop" law, but noting: "In the absence of conflicting federal legislation, there can be no doubt that it is within the police power of a State to prohibit the union or the closed shop.").

By upholding "open shop" laws in *Lincoln Fed.* and *American Sash*, this Court made clear that labor unions do not possess a constitutional right to compel financial support from workers. Nevertheless, although unions have *no constitutional right* to compel financial support from any worker, some jurisdictions (*e.g.*, the State of Washington) have granted unions a *statutory right* to compel nonmembers to pay fees to support union costs of collective bargaining.[3] A union's right to compel financial support from nonmembers – where it exists – is one of statutory law, not constitutional law.

Furthermore, although a state may authorize unions to compel financial support from nonmembers for its collective bargaining activities through enactment of "agency shop" statutes, this Court has repeatedly held that a labor union may not, consistent with the Constitution, use nonmember funds for political purposes when the nonmember explicitly objects to such use. *See Hanson*, 351 U.S. at 238; *Street*, 367 U.S. at 770; *Abood*, 431 U.S. at 222-23; *Ellis*, 466 U.S. at 447; and *Hudson*, 475 U.S. at 294.

In *Hanson*, for example, this Court upheld a federal Railway Labor Act requirement that workers pay fees to a union – *but only to the extent such fees are used to pay the costs of collective bargaining*: "We hold only that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce

[3] Of course, there is no need for a jurisdiction to create a statutory right for unions to compel *members* to pay fees – as such individuals, by definition, do so voluntarily through payment of member dues.

Clause. . . ." *Hanson*, 351 U.S. at 238. Several years later, in *Street*, this Court directly addressed a question left unanswered by the *Hanson* decision – whether funds paid by a worker pursuant to the Railway Labor Act could be used by the union to support political activities despite the worker's objection to funding such political activities. This Court in *Street* rejected the unions' claim that the Railway Labor Act empowered the unions to use "exacted funds to support political causes objected to by the employee. . . ." *Street*, 367 U.S. at 770. The Court ruled that the "unions must not support those [political] activities, against the expressed wishes of a dissenting employee, with his exacted money." *Id.*

This Court in *Street* established the *minimum* constitutional right of employees compelled to pay fees to unions – the right to "opt-out" of funding a union's political activities. The Court reiterated this *minimum* constitutional right in *Abood*, wherein nonmembers of a teacher's union, who were required by state law to pay agency shop fees to cover the costs of collective bargaining, successfully challenged on constitutional grounds the use of their agency shop fees for political purposes. *Abood*, 431 U.S. at 234.

This Court again reiterated this *minimum* constitutional "opt-out" right in *Ellis*, where the Court found the only justification for exacting fees from workers not wishing to support a union is "to eliminate free riders – employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof." *Ellis*, 466 U.S. at 447. The test, according to the Court, as to whether a worker may constitutionally be compelled to fund certain union expenditures, "must be whether the challenged

expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis*, 466 U.S. at 448.

Finally, in *Hudson*, the Court considered a constitutional challenge to a union's procedures for ensuring that the agency shop fees of dissenting nonmembers were not used to fund political activity – and found that the union's procedures did not adequately protect the *minimum* constitutional "opt-out" rights of nonmembers. *Hudson*, 475 U.S. at 304-310.

The common thread between these cases – *Hanson*, *Street*, *Abood*, *Ellis* and *Hudson* – is the absence of a statutory safeguard against the use of a dissenting worker's funds for political purposes. In the absence of such a statutory safeguard, this Court articulated and reiterated the *minimum* constitutional rights of dissenting workers: the right to "opt-out" of supporting such activities. In none of these decisions did the Court purport to establish the maximum extent to which a state or Congress could legislate in an effort to safeguard dissenting workers' rights – the Court had no reason to analyze the constitutionality of safeguards that did not exist.

At issue in this case is precisely this question of whether a state may go beyond this minimum constitutional protection of nonmembers' rights, to provide additional statutory protection for nonmembers by requiring a union to obtain affirmative authorization from nonmembers before using such individuals' funds for political purposes. *Amicus* believes that a state may constitutionally do so, in order to protect nonmembers' well-established First

Amendment freedom from compelled political association and speech.[4]

In the decision below, the Supreme Court of Washington correctly recognized this Court's long line of cases establishing that "compulsory union dues may not be used to support political causes if the member disagrees with those causes." *WEA*, 156 Wash. 2d at 558. The Washington Court then went on to misconstrue this Court's decisions in *Street* and *Abood* as establishing – as a matter of constitutional law – "that the burden is on the employee to make his objection known." *Id.* at 559.

The Washington Court confused this Court's articulation of what the Constitution *requires* with regard to nonmembers' rights, as a statement of the extent to which the Constitution *permits* states to protect nonmembers' rights. Put differently, the Washington Court misconstrued this Court's decisions as establishing the *maximum* First Amendment rights possessed by union nonmembers, when, in fact, the decisions established their *minimum* First Amendment rights.

---

[4] "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234-35 (footnote omitted); *see also Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557 (1995); *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990).

As explained by Washington Supreme Court Justice Sanders in dissent:

> The majority turn[ed] the First Amendment on its head. Unions have a statutory, not a constitutional, right to cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount. Absent this statutory mechanism for withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it.

WEA, 156 Wash. 2d at 571-72 (Sanders, J., dissenting). Justice Sanders further explained that the majority "distort[ed]" this Court's decisions "delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree to do the opposite: limit the State's ability to protect such dissenters." *Id.* at 574-75.

The Washington Court's decision invalidating the state law "opt-in" requirement, Wash. Rev. Code § 42.17.760, is based on an erroneous interpretation of this Court's decisions in *Street*, *Abood*, *Ellis* and *Hudson*. For this reason, we respectfully urge this Court to make clear that the Court's decisions in *Street*, *Abood*, *Ellis* and *Hudson* establish the minimum, not the maximum, First Amendment rights of dissenting workers – and to reverse the decision of the Supreme Court of Washington in this case.

II. THIS COURT'S DECISION IN *MCCONNELL* UPHOLDING THE FEDERAL "OPT-IN" REQUIREMENT MAKES CLEAR THAT THE WASHINGTON "OPT-IN" REQUIREMENT IS CONSTITUTIONAL.

The Supreme Court of Washington held that the state law "opt-in" requirement for union funding of political activity violates the union's federal constitutional rights. The state court's ruling is inconsistent with this Court's decision in *McConnell*, which upheld the even-more-restrictive federal separate segregated fund "opt-in" requirement, and undermines more than 50 years of congressional regulation of labor union use of treasury funds to influence elections.

The Hatch Act, enacted more than 65 years ago, is widely recognized as the first congressional restriction on labor union political activity. *See, e.g.*, *McConnell*, 540 U.S. at 116. This Court, in *McConnell*, approvingly detailed Congress' long history of regulating labor union political activities. The Court began its analysis by reviewing Congress' regulation of *corporate* political activity dating back to 1907, underscoring that restrictions on corporate and labor union political activity are cut from the same cloth. The Court explained at length:

> Congress' historical concern with the "political potentialities of wealth" and their "untoward consequences for the democratic process," has long reached beyond corporate money. During and shortly after World War II, Congress reacted to the "enormous financial outlays" made by some unions in connection with national elections. Congress first restricted union contributions in the Hatch Act, 18 U.S.C. § 610, and it later prohibited "union contributions in connection with federal

> elections altogether." Congress subsequently extended that prohibition to cover unions' election-related expenditures as well as contributions, and it broadened the coverage of federal campaigns to include both primary and general elections. Labor Management Relations Act, 1947 (Taft-Hartley Act), 61 Stat. 136. During the consideration of those measures, legislators repeatedly voiced their concerns regarding the pernicious influence of large campaign contributions. See 93 Cong. Rec. 3428, 3522 (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947); S. Rep. No. 1, 80th Cong., 1st Sess., pt. 2 (1947); H.R. Rep. No. 2093, 78th Cong., 2d Sess. (1945). *As we noted in a unanimous [Nat'l Right to Work] opinion recalling this history, Congress' "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference."*

McConnell, 540 U.S. at 116-17 (footnote omitted) (citations and quotation marks omitted) (emphasis added) (quoting *U.S. v. Automobile Workers,* 352 U.S. 567, at 577-84 (1957); *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) [hereinafter *Nat'l Right to Work Comm.*]).

The *McConnell* Court reviewed the history of congressional regulation of labor union political activity as a preface to its consideration of a constitutional challenge to a then-recent amendment to the longstanding ban on labor union use of treasury funds for political contributions and expenditures, which was enacted by Congress as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), § 203,

Pub. L. No. 107-155, 116 Stat. 81 (codified at 2 U.S.C. § 441b).

BCRA § 203 (codified at 2 U.S.C. § 441b) prohibits labor unions and corporations from using treasury funds to pay for "electioneering communication." *See* 2 U.S.C. §§ 441b(a) and (b)(2). "Electioneering communication," in turn, is defined to mean any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office, made within 30 days of a primary election or 60 days of a general election, and targeted to the relevant electorate. *See* 2 U.S.C. §§ 441b(c)(1) and 434(f)(3).

The *McConnell* Court began its analysis of the constitutionality of this BCRA restriction on labor union political activity by noting:

> Since our decision in *Buckley,* Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law. The *ability to form and administer separate segregated funds* authorized by FECA § 316, 2 U.S.C.A. § 441b (main ed. and Supp. 2003), *has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view, and it is not challenged in this litigation.*

McConnell, 540 U.S. at 203 (footnote omitted) (emphasis added).

The *McConnell* Court reasoned that BCRA's ban on labor union use of treasury funds to pay for "electioneering

communication" intended to influence voters' decisions is the "functional equivalent" of the longstanding ban on labor union use of treasury funds to pay for "express advocacy" political advertising. *McConnell*, 540 U.S. at 206. The Court upheld the BCRA labor union restriction as constitutional, finding the federal law "opt-in" PAC provision constitutionally sufficient to protect a union's First Amendment rights in both the "express advocacy" and "electioneering communication" contexts.

Like the Washington "opt-in" provision invalidated by the Supreme Court of Washington, federal law allows labor union political activity only to the extent that workers "opt-in" to a union's political activities by contributing to a labor union PAC. *See* 2 U.S.C. § 441b(b). However, the federal "opt-in" law upheld by this Court in *McConnell* is significantly more restrictive than the state law invalidated below. Under federal law, only *union members may "opt-in" to supporting a union's political activities*. *See* 2 U.S.C. § 441b(b)(4)(A)(ii). By contrast, under the invalidated Washington law, unions are permitted to freely spend treasury funds obtained from members and to receive financial support for their political activities from nonmembers – so long as the nonmembers "opt-in" to supporting the union's political activities.

However, whereas this Court, in *McConnell,* made clear the Court's "unanimous view" that the more-restrictive federal law "opt-in" procedure provides unions with a "constitutionally sufficient" opportunity to engage in political speech, the Supreme Court of Washington's decision below held that the less-restrictive state law "opt-in" procedure violates the federal constitutional rights of labor unions. By comparison to the federal law "opt-in" requirement that prohibits financial support of union

political activity by nonmembers, Washington law reasonably facilitates nonmember political speech by permitting nonmembers to "opt-in" to financially supporting union political activity. Yet the Washington Court remarkably held that the state law "presumption of dissent *violates the First Amendment rights of* both members and *nonmembers*." *WEA*, 156 Wash. 2d at 560 (emphasis added); *but cf. Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997).[5] Given that nonmembers are nonmembers precisely because they have declined to join the union, it is difficult to comprehend how a presumption of dissent violates the First Amendment of such dissenters. Indeed, a presumption of dissent for nonmembers seems to be the most appropriate interpretation.

The Supreme Court of Washington's decision in this case invalidating Washington's "opt-in" provision on the ground that the provision violates the First Amendment rights of unions (as well as nonmembers who refuse to join the union) is wholly inconsistent with this Court's decision in *McConnell*, where the Court upheld the "opt-in" provision of 2 U.S.C. § 441b, as well as the other decisions of this Court that have upheld the "opt-in" provision of 2 U.S.C. § 441b against constitutional challenge. *See, e.g., Nat'l Right to Work Comm.*, 459 U.S. 197; *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003); *see also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)

---

[5] The Sixth Circuit Court of Appeals in *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), upheld as constitutional a state law requiring unions to obtain annual affirmative authorization from members for a political committee contribution payroll deduction plan – and commented that the union's argument that the affirmative authorization plan violates the First Amendment rights of contributors "borders on the frivolous." *Id.* at 1253.

(upholding as constitutional a state law "opt-in" requirement for corporate political spending).

This Court's decision and reasoning in *McConnell* provides ample support that "opt-in" laws such as the one at issue in this case, Wash. Rev. Code § 42.17.760, are constitutional. For this reason, we respectfully urge the Court to reverse the decision of the court below.

III. THE WASHINGTON SUPREME COURT'S DECISION UNDERMINES STATE "OPT-IN" LAWS THROUGHOUT THE NATION.

The Supreme Court of Washington's decision in this case is not only inconsistent with longstanding federal law restrictions on labor union use of treasury funds to influence elections, but it also undermines the laws of at least fourteen other states that have followed Congress' lead – approved by this Court – by similarly restricting labor union and corporate candidate-related political activity.[6]

The appendix to this brief contains descriptions of fourteen states' "opt-in" laws restricting union and corporate political activity, all of which would seemingly be

---

[6] *See, e.g.*, Alaska Stat. §§ 15.13.067, 15.13.074 and 15.13.400(8) (2006); Ariz. Rev. Stat. Ann. §§ 16-919, 16-920, and 16-921 (West 2006); COLO. CONST. art. XXVIII, §§ 3(4) and 6(2); Ind. Code Ann. §§ 3-9-2-4 and 3-9-2-5(b) (West 2006); Mich. Comp. Laws Ann. §§ 169.254(1) and 169.255 (West 2006); Mont. Code Ann. § 39-31-402 (2006); N.C. Gen. Stat. § 163-278.19 (2006); N.D. Cent. Code §§ 16.1-08.1-01 and 16.1-08.1-03.3 (2006); Ohio Rev. Code Ann. §§ 3517.082, 3599.03 and 3599.031 (West 2006); Pa. Stat. Ann. tit. 25, § 3253 and Pa. Stat. Ann. tit. 43, § 1101.1701 (West 2006); R.I. Gen. Laws §§ 17-25-3(1) and 17-25-10.1(h) (2006); S.D. Codified Laws §§ 12-25-1(1) and 12-25-2 (2006); Tex. Elec. Code Ann. §§ 253.094 and 253.100 (Vernon 2006); and Wyo. Stat. Ann. § 22-25-102 (2006).

subject to challenge and invalidation if the reasoning of the Washington Supreme Court was followed.

Although the Supreme Court of Washington's decision is not controlling law in other states, courts in other states have already begun citing the Washington Court's *WEA* decision when analyzing similar "opt-in" restrictions on labor union political activity. A Colorado state appellate court, for example, recently issued a decision invalidating a state administrative rule establishing an "opt-in" requirement for union member contributions to a union political committee. In so ruling, the Colorado appellate court approvingly cited the Washington Court's *WEA* decision, noting: "[T]he Supreme Court of Washington, applying strict scrutiny review, declared unconstitutional a statute that, like the Secretary's definition here, imposed an 'opt in' procedure." *Sanger v. Dennis*, No. 06CA1944, 2006 Colo. App. LEXIS 1619, at *30 (Colo. Ct. App. Sept. 28, 2006). Although the Colorado court applied intermediate, rather than strict scrutiny to the Colorado regulation, it reached the same conclusion as the Washington Court, striking down as unconstitutional a state "opt-in" requirement.

Given that the Supreme Court of Washington relied exclusively on its misconstruction of this Court's decisions as the basis for its invalidation of Wash. Rev. Code § 42.17.760, and that this misconstruction will undoubtedly be relied upon by other courts to strike down constitutional state law "opt-in" requirements, we urge this Court to reverse the Washington Court's decision in this case. A reversal of the decision below will make clear that "opt-in" restrictions on union political activities in states around the nation do not violate the First Amendment rights of unions.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the Supreme Court of Washington should be reversed.

Dated: November 7, 2006

Respectfully submitted,

TREVOR POTTER
J. GERALD HEBERT
Counsel of Record
PAUL S. RYAN
CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave. NW
Suite 650
Washington, DC 20036
(202) 736-2200

APPENDIX

The following are brief descriptions of the laws of fourteen states which, like the State of Washington and the federal government, have established "opt-in" restrictions on labor union political activity.

ALASKA. Under Alaska law, labor unions and corporations are prohibited from using treasury funds to make candidate-related political contributions and expenditures. However, labor unions may make contributions and expenditures through a PAC (called a "group" under Alaska law) to the extent that individuals "opt-in" to such political activity by making contributions to the PAC. *See* Alaska Stat. §§ 15.13.074, 15.13.067, and 15.13.400(8) (2006).

ARIZONA. Likewise, Arizona law prohibits labor unions and corporations from making candidate-related political contributions or expenditures using treasury funds. However, as under federal law, an Arizona union or corporation is permitted to establish a PAC that may make political contributions and expenditures to the extent that salaried corporate employees and shareholders, or union members, "opt-in" to such political activity by contributing to the PAC. *See* Ariz. Rev. Stat. Ann. §§ 16-919, 16-920, and 16-921 (West 2006).

COLORADO. The Colorado Constitution prohibits unions and corporations from making contributions to candidates or political parties, and also prohibits unions and corporations from making expenditures or payments

for electioneering communication, using treasury funds.[1] A Colorado union or corporation is permitted to establish a PAC, which may accept "opt-in" contributions from employees, members and shareholders. COLO. CONST. art. XXVIII, §§ 3(4) and 6(2).[2]

INDIANA. Under Indiana law, though political contributions from individuals are unlimited, contributions from union and corporate treasuries are strictly limited. For example, a union may only contribute an aggregate of $5,000 apportioned in any manner among all candidates for state office, and an aggregate of $5,000 apportioned in any manner among all state political party committees. *See* Ind. Code Ann. § 3-9-2-4 (West 2006). However, a union or corporation may establish and pay the administrative costs of a PAC and encourage individuals to "opt-in" to supporting the PAC by voluntarily contributing to it. *See id.* at § 3-9-2-5(b). Unlike contributions

---

[1] The application of these state constitutional provisions were recently challenged on federal constitutional grounds by a nonprofit 501(c)(4) corporation that receives "approximately $50 of corporate funding per year." *Colo. Right to Life v. Davidson*, 395 F. Supp. 2d 1001, 1014 (D. Colo. 2005). The district court found that the plaintiff was entitled to an exemption from the state laws under this Court's decision in *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986). *Colo. Right to Life*, 395 F. Supp. 2d at 1014-15. The district court's decision in *Colo. Right to Life* is presently on appeal and has no bearing on the application of Colorado's "opt-in" requirement to labor unions.

[2] An administrative regulation promulgated by the Colorado Secretary of State, establishing procedures to implement the state law "opt-in" requirement for contributions by union members to a union political committee, was recently challenged on constitutional grounds and invalidated in *Sanger v. Dennis*, No. 06CA1944, 2006 Colo. App. LEXIS 1619 (Colo. Ct. App. Sept. 28, 2006). The lawsuit did not, however, challenge or impact the state constitution provisions referenced here.

from union and corporate treasuries which are strictly limited, contributions to candidates and parties from union and corporate PACs are unlimited.

MICHIGAN. Michigan prohibits unions and corporations from making political contributions and expenditures using treasury funds. *See* Mich. Comp. Laws Ann. § 169.254(1) (West 2006). Michigan law does permit a union or corporation to establish a PAC to engage in political spending, but further provides that a union may only finance such a PAC with "opt-in" contributions from members. *See id.* at § 169.255(1)-(4). Specifically, Michigan law provides that a union may solicit contributions from a member "on an automatic basis, including but not limited to a payroll deduction plan, *only if the individual* who is contributing to the fund *affirmatively consents* to the contribution at least once in every calendar year." *Id.* at § 169.255(6) (emphasis added).

MONTANA. Montana flatly prohibits labor unions from using agency shop fees to make political contributions. *See* Mont. Code Ann. § 39-31-402 (2006).

NORTH CAROLINA. The State of North Carolina prohibits labor unions and corporations from using treasury funds to make candidate-related contributions or expenditures. Unions and corporations may, however, establish PACs in order to make contributions and expenditures to the extent that individuals "opt-in" to financially supporting union and corporate political activities by contributing to such PACs. *See* N.C. Gen. Stat. § 163-278.19 (2006).

NORTH DAKOTA. North Dakota prohibits unions and corporations from using treasury funds to make contributions to candidates and parties. However, state

law permits unions and corporations to establish PACs for political purposes, which workers may "opt-in" to supporting by making contributions. *See* N.D. Cent. Code §§ 16.1-08.1-01(1), (4) and 16.1-08.1-03.3 (2006).

OHIO. Ohio law prohibits unions and corporations from using treasury funds to make political contributions or expenditures supporting or opposing candidates. *See* Ohio Rev. Code Ann. § 3599.03 (West 2006). A union or corporation may, however, establish a PAC and solicit "opt-in" contributions for such a PAC from members, employees, and shareholders; any deduction of political contributions from employee wages requires *written authorization* by the employee. *See id.* at §§ 3517.082 and 3599.031.

PENNSYLVANIA. Pennsylvania law prohibits unions and corporations from using treasury funds to make political contributions or expenditures, but permits such entities to establish PACs, which individuals may "opt-in" to supporting by making voluntary contributions. *See* Pa. Stat. Ann. tit. 25, § 3253 (West 2006); *see also id.* at tit. 43, § 1101.1701.

RHODE ISLAND. Rhode Island law prohibits unions and corporations from using treasury funds to make political contributions or expenditures, but permits such entities to administer "opt-in" payroll deduction schemes through which employees may voluntarily "opt-in" to making contributions to political committees and candidates. *See* R.I. Gen. Laws §§ 17-25-10.1(h) and 17-25-3(1) (2006).

SOUTH DAKOTA. South Dakota law prohibits unions and corporations from using treasury funds to make political contributions, but permits such entities to establish PACs, which individuals may "opt-in" to supporting by

making voluntary contributions. *See* S.D. Codified Laws §§ 12-25-1(1) and 12-25-2 (2006).

TEXAS. The State of Texas prohibits unions and corporations from using treasury funds to make contributions to or expenditures in support of candidates. Unions and corporations are, however, permitted to establish PACs, and may only solicit "opt-in" contributions to such PACs from members and employees. *See* Tex. Elec. Code Ann. §§ 253.094 and 253.100 (Vernon 2006).

WYOMING. Finally, Wyoming law prohibits unions and corporations from using treasury funds to make political contributions. Such entities may solicit "opt-in" contributions to a PAC for political purposes, but a union's use of any payroll deduction scheme for the making of such contributions requires the contributing individual to "*affirmatively consent[ ] in writing* to the contribution at least once in every calendar year." *See* Wyo. Stat. Ann. §§ 22-25-102(a) and (h) (2006).

Nos. 05-1589 & 05-1657

IN THE

Supreme Court of the United States

GARY DAVENPORT, *et al.*,
Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE, REASON FOUNDATION, AND THE CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER, P.C.
601 West Fifth Street, Suite 800
Los Angeles, CA 90071
213.617.0414

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

November 13, 2006

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE DECISION BELOW INCORRECTLY DISPARAGES THE FIRST AMENDMENT RIGHTS OF NON-UNION EMPLOYEES. 8

II. THE UNION HAS NO COMPETING ASSOCIATIONAL RIGHTS RELATIVE TO NONMEMBERS WHO HAVE NOT ELECTED TO ASSOCIATE WITH IT. 17

CONCLUSION 24

TABLE OF AUTHORITIES

Pages

Cases

Abood v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) ..... passim

Chicago Teachers Union v. *Hudson*, 475 U.S. 292 (1986) ..... passim

Ellis v. *Railway Clerks*, 466 U.S. 435 (1984) 9, 11, 12

Hurley v. *Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557 (1995) 16

International Ass'n of Machinists v. *Street*, 367 U.S. 740 (1961) ..... passim

Railway Clerks v. *Allen*, 373 U.S. 113 (1963) 13, 15, 17

Statutes

RCW 41.59.060 2

RCW 41.59.100 2

RCW 42.17.760 ..... passim

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the further collapse of constitutional protections for the freedom to support speech and association voluntarily, and not as a result of state coercion, which lies at the very heart of the First Amendment.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason Magazine*, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech and association – and con-

---

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

travenes Reason's avowed purpose to advance "Free Minds and Free Markets."

The Center for Individual Freedom (the Center) is a non-profit organization with the mission to investigate, explore, and communicate in all areas of individual freedom and individual rights, including, but not limited to, free speech rights, property rights, privacy rights, the right to bear arms, freedom of association, and religious freedoms. Of particular importance to the Center are constitutional protections for the freedom of speech, including each citizen's freedom from being compelled to support the speech of others.

STATEMENT

The State of Washington permits a union that negotiates an agency shop agreement with an employer to collect agency fees from nonmember employees at a level equal to the amount that members of the union pay as dues. RCW 41.59.060 & -.100. Such amount, however, represents more than just the pro-rata costs of collective bargaining, contract administration, and grievance adjustment, and includes the costs of political contributions and other non-germane activities that have nothing to do with the collective bargaining process and that are not "chargeable" to nonmembers. A nonmember employee of an agency shop previously could only recover such non-chargeable portion of their agency fee by annually objecting to that portion of the fee in response to a misdescribed so-called "*Hudson* packet" identifying the excess charges and giving the employee a limited opportunity to opt-out of such charges. That system effectively enabled the union to automatically take money to which it had no proper entitlement and then place the burden on the nonmembers of taking action to recover money that was rightfully theirs to begin with. The constitutionality of such a system is highly suspect and, in any event, is wholly inconsistent with the purposes for which agency fees are allowed at all.

Recognizing this profound, unfair, and potentially fatal, flaw in the agency-shop system, the people of Washington adopted by initiative a provision that forbids a union from using excess agency fees for political purposes without the affirmative consent of the nonmembers from whom the excess fees were taken. The relevant provision, RCW 42.17.760 ("§ 760"), provides:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

Instead of the opt-out system previously in effect, the law thus requires an "opt-in" system in order for the union to convert excess fees taken without employee consent into voluntary political contributions to the union.

Such an opt-in system for excess fees unrelated to the union's collective bargaining function basically requires the union to do what every other organization in the country must do when they seek contributions from nonmembers – it must get such strangers to affirmatively *make* such contributions. *See* Opinion Below ("Op.") ¶ 19 ("The plain language seems to indicate a nonmember must provide an expression of positive authorization. Failure to respond to the *Hudson* packet may be considered acquiescence, but it would not fulfill the affirmative authorization requirement. The difference is that affirmative authorization seems to indicate that the [non]member must say 'yes,' instead of failing to say 'no.'"). Nonmember authorization, however, need not be in writing, and any affirmative indication of consent to use the excess portion of the agency fee will suffice to allow the union to keep such portion of the fee. Op. ¶ 20 (§ 760 does "not require written authorization").

The decision below struck down the opt-in requirement of § 760 on the ill-conceived grounds that it abridged the First

Amendment rights of the union to engage in political association with nonmembers who simply fail to respond to the *Hudson* packet, and that any competing rights of dissenting nonmembers were adequately protected by the *Hudson* opt-out procedure, which served as a less restrictive means of protecting their rights without burdening the supposed First Amendment rights of the union. Op. ¶¶ 58-60.

While there are a plethora of conceptual and legal errors in the decision below, this brief will focus primarily on: (1) the unconstitutionality, at the outset, of exacting and keeping that portion of the agency fee that is admittedly not germane to collective bargaining activities and hence that does not advance the only state interests that justify agency fees in the first place; (2) the complete absence of any protected association between the union and *non*members who have not affirmatively and voluntarily entered into such an association; and (3) the inconsistent First Amendment standards applied by the court below when evaluating the rights of nonmember employees and the supposed rights of the union.

SUMMARY OF ARGUMENT

1. The exaction of agency fees in amounts exceeding the pro-rata costs of collective bargaining and germane related activities violates the First Amendment rights of employees who are not members of the union, regardless whether they have affirmatively demanded the return of monies unconstitutionally withheld. Agency fees are constitutional only because they serve an asserted state interest of fairly distributing the costs of collective bargaining and workplace representation to all employees (whether union members or not) who benefit from such activities. The corollary of that limited justification for agency fees is that where the fees admittedly include a component that is *not* germane to collective bargaining activities, such component may not be exacted from nonmembers of the union *at all* in that there is no state interest whatsoever supporting such excess fees.

The various opt-out procedures endorsed by this Court in the past relate to very different situations where either all employees were obliged to become members of the union, and hence it was impossible to distinguish whether any individual membership was voluntary or not, or the unions in question had *already excluded* all obvious non-chargeable expenses and reduced the agency fee at the front-end, and any remaining objections were to expenses the germaneness of which was at least fairly debatable. In those two situations, an opt-out remedy may well be appropriate and a presumption of dissent inappropriate. But here, where there is no dispute that the political expenditures at issue are not germane and not chargeable, and the opt-in requirement only applies to employees who are *not* members of the union and hence are not presumptively associated with the union, an opt-in procedure is constitutionally required.

2. In contrast to the clear First Amendment rights of nonmembers to remain silent and unassociated with the union's political activities, the union itself has no First Amendment right to extract excess agency fees and simply *presume* an expressive association with nonmembers who have conspicuously declined to join the union. While the court below based its new-found union rights on this Court's decision in *International Association of Machinists* v. *Street,* 367 U.S. 740 (1961), and related cases, the essential difference between those cases and the present case is that they involved *union* shops in which all employees were *members* of the union (albeit some unknown number of them involuntarily so), whereas in this case we have an *agency* shop that does not compel union membership and the opt-in requirement applies only to nonmember fees, not member dues.

While a presumption of protected free association may be appropriate as between a union and its *members*, and hence dissent should not be presumed as to such *members* even in a union shop environment, the exact opposite presumption should apply here. As to nonmembers, while the union has

the right to *solicit* their support, it has no claim to any protected actual association with them absent some affirmative action by the nonmembers themselves to associate with the union. Because § 760 does nothing more than require some minimal evidence of such voluntary association before a union may keep excess agency fees, it does not even remotely implicate, much less burden, any of the union's First Amendment rights.

3. Even assuming that § 760's opt-in requirement somehow implicates the union's First Amendment rights, the court below applied an improper double standard when evaluating the alleged abridgement of such rights as compared to the rights of nonmembers who desire to remain silent and unassociated with the union. In connection with both the claimed burdens on First Amendment rights and the potential availability of less restrictive means for advancing any valid state interests, the court below treated what are essentially two sides of the same coin in very different manners. That disparity in treatment yielded a result that both lacks internal coherence and is absurd on its face.

ARGUMENT

This case presents the question whether a union has the right to extract and keep, without affirmative consent from nonmembers, excess agency fees when it knows, *ex ante*, that a portion of those fees will go to non-chargeable, nongermane, expenses having nothing to do with collective bargaining, contract administration, or grievance procedures. The court below initially held that the so-called *Hudson* opt-out procedure used by the union was the *only* proper means of protecting nonmember employee First Amendment rights. The court then manufactured a diametrically opposed right of the union to charge nonmembers for non-germane activities and to presume that such nonmembers consented to those unconstitutional charges absent affirmative objection.

Based on the court's misconceptions regarding the First Amendment rights at issue, it concluded that this case involved "*competing* rights – the right to freely associate for the purpose of political speech and the right to be free from forced association – in the context of the political speech of labor organizations." Op. ¶ 29. In doing so it set up a false dichotomy, and sought to "strike[] a balance between those who disagree with the labor organization's political activities and those who support the political activities." *Id.*

Relying primarily on *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986), and *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), the court below erroneously determined that an "employee who is given a simple and convenient method of registering dissent has not been compelled to support a political cause and has not suffered a violation of his or her First Amendment rights." Op. ¶ 34. It then concluded that § 760 was unconstitutional because "the union's expressive activity is significantly burdened by § 760's opt-in requirement" and that "any compelling state interest in protecting dissenters' rights[] could be met by less restrictive means other than the § 760 opt-in procedure," such as the union's *Hudson* procedures, which "amount to a constitutionally permissible alternative that adequately protects both the union and dissenters." Op. ¶ 50.

The court's entire approach, however, stems from the false – in fact, absurd – premises that non-union employees have nothing more than a right to *dissent* from the union's use of portions of the agency fee that it should never have been allowed to charge in the first place, and that the union has a presumptive right to exact fees from nonmembers for non-chargeable expenses. No such right exists and, in fact, charging nonmembers for such known expenses is an unequivocal violation of the First Amendment.

Street and *Hudson* set the essential parameters and lay the foundation for how to deal with the rights of union members and nonmembers and teach that the court below got it exactly

backwards in this case because (1) it involves an agency shop, rather than a union shop, where an employee's voluntary association or non-association with the union can be seen from that employee's membership or lack thereof in the union, and (2) it involves a portion of fees that are, without dispute, not germane to the collective bargaining enterprise, yet there has been no prior effort to exclude that non-chargeable component of expenses from the amount of the agency fee at the outset. Only a deep misunderstanding, or a profound contempt, for the First Amendment could lead to the completely backwards conclusion that the union not only is *allowed* to extract and keep such excess fees having nothing to do with the interests supporting agency fees in the first place, but actually has a First Amendment *right* to keep such excess nonmember fees absent an affirmative objection made according to the narrow opt-out procedures.

I. The Decision Below Incorrectly Disparages the First Amendment Rights of Non-Union Employees.

Misunderstanding the teachings of this Court's decisions in *Hudson* and *Street*, the court below held that nonmembers' First Amendment rights relative to non-chargeable expenses unrelated to collective bargaining were limited to a narrow opportunity to opt-out of paying for such expenses on an annual basis. Op. ¶¶ 58, 60. But that approach ignores the very limited state interests that can justify agency fees in the first place, ignores the actual details of the process discussed in *Hudson* (under which clearly non-chargeable expenses were deducted in advance and the agency fee reduced accordingly), and ignores the very different context of *Street* (a *union* shop where all employees were forced to be union *members*, as opposed to an *agency* shop where union membership is not required).

The two essential facts of this case thus are (1) the opt-in requirement of § 760 applies only to such portion of the agency fee attributable to political activities that are *indis-*

putably non-germane and hence non-chargeable, unlike the portion of the fees at issue in *Hudson*, regarding which the union made a good faith assertion of their being germane to collective bargaining, and (2) the opt-in requirement here applies only to excess fees taken from *nonmembers* who, unlike the union members in *Street*, cannot be presumed to support the non-germane activities of a union they refuse to join. Such excess amounts should never have been included in the agency fee charged to nonmembers in the first place, and it mangles the First Amendment to place the burden of recovering such facially unconstitutional fees on the nonmembers from whom they were effectively stolen.

This Court's long line of cases regarding compelled support for union activities have identified only two related government interests that can justify the First Amendment burdens created by such compelled support. The first interest is the promotion of labor peace that is thought to stem from an increased use of collective bargaining and related contract administration and grievance procedures that apply to all employees, regardless whether they are union members. *See Hudson*, 475 U.S. at 302 n. 8; *Ellis* v. *Railway Clerks*, 466 U.S. 435, 455-56 (1984); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 219 (1977). The second related interest is that of allowing unions to negotiate for a fair distribution of the *costs* of such collective bargaining and related procedures, which benefit all employees and hence should be borne by members and nonmembers alike – often referred to as eliminating the "free-rider" problem. *See Hudson*, 475 U.S. at 294-95; *Abood*, 431 U.S. at 221-22; *Street*, 367 U.S. at 761, 763.

Those are the sole interests that support the imposition of agency fees, and any agency fee arrangement must be narrowly tailored to such interests. *Abood*, 431 U.S. at 220, 237.[2] Excess agency fees that do not support collective bar-

---

[2] *Cf. Street*, 367 U.S. at 767, 768 ("[I]t is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied

gaining and related activities thus are not narrowly tailored to the state interests. In this case, the mere collection of that portion of the agency fee that represents expenditures for political activities rather than collective bargaining – the admittedly non-chargeable expenses – violates the First Amendment on its face, regardless whether employees are allowed to seek reimbursement by jumping through the former procedural hoops for opting out each year.

The court below effectively ignored the inherent limits on the exaction of agency fees by claiming that "there is no compelled support if the union utilizes the *Hudson* procedures" and hence there is no "governmental interference with First Amendment rights of nonmembers for § 760 to protect against." Op. ¶ 48. That reasoning badly misreads this Court's decision in *Hudson*, ignores this Court's teachings that the exaction of agency fees creates a First Amendment burden regardless whether such burden is outweighed by narrowly defined state interests, and ignores that here there is no state interest whatsoever to support even the initial collection of a plainly non-chargeable component of the agency fee.

A proper reading of *Hudson* demonstrates not only that the court below misunderstood that case, but also shows that the political spending component of the agency fee should never have been collected at all.

In *Hudson*, the Illinois law under review allowed the union to charge only "proportionate share payments" as an

---

in the 1934 Act, but rather made inroads on it for the *limited purpose* of eliminating the problems created by the 'free rider.'"; The power given to unions to spend exacted money is not "unlimited," and "[i]ts use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls *clearly outside the reasons* advanced by the unions and accepted by Congress *why authority to make unionshop agreements was justified*.") (emphasis added).

agency fee from nonmembers, and specified that such payment amounts "could not exceed the members' dues." 475 U.S. at 295. Consistent with the cost-sharing and free-rider justifications for the agency fee, the union "identified expenditures unrelated to collective bargaining and contract administration," calculated the percentage of such unrelated expenditures relative to its total expenditures, and set the agency fee at 95% of the amount of union dues. *Id.* Only *after* deducting all plainly non-chargeable amounts off the top did the union's procedure for objecting to the remaining, presumptively chargeable, fee kick in. *Id.* at 296. Furthermore, any subsequent successful objections to items included in the fee calculation resulted in "an immediate reduction in the amount of future [fees] for all nonmembers and a rebate for the objector." *Id.*

On a subsequent legal challenge to the procedures adopted by the union, the district court upheld those procedures in part because, *inter alia*, the fee charged "represented a good-faith effort by the Union" to calculate a proper fee. *Id.* at 298. The Seventh Circuit reversed and struck down the procedures as insufficiently protective of nonmember rights not to be compelled to subsidize union activities that were not germane to the collective bargaining process. *Id.* at 299.

This Court affirmed the Seventh Circuit, finding the procedures constitutionally inadequate. Based on its earlier decision in *Ellis*, this Court held that a "'pure rebate approach is inadequate'" because the union was not entitled to an "'involuntary loan'" and there were "'readily available alternatives, such as *advance reduction of dues* and/or interest-bearing escrow accounts.'" *Hudson*, 475 U.S. at 303-04 (quoting *Ellis*, 466 U.S. at 443-44) (emphasis added). This Court further held that "'the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to

collective bargaining.'" 475 U.S. at 304 (quoting *Abood*, 431 U.S. at 244 (Stevens, J., concurring)).

Hudson concluded that even the advance reduction of dues, without the necessity of prior objection by nonmembers, was constitutionally inadequate because it did not provide nonmembers with sufficient information about what other charges were *included* in the fee calculation as supposedly germane to collective bargaining. 475 U.S. at 306. The problem even with the advance reduction in fees thus was that it did not go *far enough* in that it only "identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers," and provided no information that would enable nonmembers to challenge allegedly germane expenditures that *were* included as part of the fee. *Id.* at 307. "An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%." *Id.* (footnote omitted).

Because "the agency shop itself is 'a significant impingement on First Amendment rights,' *Ellis*, 466 U.S., at 455, the government and union have a responsibility to provide procedures that minimize that impingement * * *." *Hudson*, 475 U.S. at 307 n. 20; *id.* (procedures failed to fulfill the union's front-end obligation "to minimize the risk that nonunion employees' contributions might be used for impermissible purposes," and "failed to provide adequate justification for the advance reduction of dues"). This Court concluded that the Constitution required, among other things, "an adequate explanation for the advance reduction of dues," and a prompt and impartial procedure for challenging the union's claims that the remaining *reduced* fee represents only properly chargeable expenses. 475 U.S. at 309; *id.* at 310 (describing "constitutional requirements" for collection of agency fee).

In that context this Court's comment regarding the nonmember's "burden of raising an objection" takes on a very

different meaning – it is a burden of challenging portions of the fee that the union in good faith claims are indeed chargeable, not the burden of challenging amounts that are indisputably *not* chargeable. Quoting *Abood*, this Court in *Hudson* reiterated

> "that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof: ' "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." ' *Abood*, 431 U.S., at 239-240, n. 40, quoting *Railway Clerks* v. *Allen*, 373 U.S. 113, 122 (1963)."

Hudson, 475 U.S. at 306 (footnote omitted). "[B]ecause the agency shop itself impinges on the nonunion employees' First Amendment interests, and because the nonunion employee has the burden of objection," the "appropriately justified *advance reduction* and the prompt, impartial decisionmaker are *necessary* to minimize both the impingement and the burden." *Id.* at 309 (footnote omitted).

Hudson thus makes clear that an advance reduction of the agency fee to exclude non-chargeable expenses was necessary, but not sufficient, and that the *nonmember's* burden of objection to an agency fee arises only *after* the initial deduction of expenses that are plainly not related to collective bargaining. While a nonmember may have the burden of initiating a challenge to parts of the fee included in good faith, it is the *union* that bears the initial burden of removing obviously non-chargeable amounts from the fee before it is even exacted.

The perversely-named *Hudson* procedures that previously existed in Washington, and that the court below imagined adequate to protect nonmember rights, do not even remotely satisfy *Hudson*'s constitutional requirements because they

required no advance reduction of obviously non-chargeable amounts for political activities and placed the burden on nonmembers to object to such facially improper charges. Section 760's opt-in procedure does nothing more than partially restore the safeguards discussed in *Hudson* itself by requiring a deduction of non-chargeable amounts absent a voluntary and affirmative contribution of such amounts by the nonmembers.

Rather than properly enforcing the requirements of *Hudson*, the court below relied on this Court's decision in *Street*, handed down a generation earlier, for the propositions that the interests of both the union and the dissenters must be protected "'to the maximum extent possible without undue impingement of one on the other,'" and that "dissent is not to be presumed – it must be affirmatively made known to the union by the dissenting employee." Op. ¶ 32 (quoting *Street*, 367 U.S. 773-74).

The court's reliance below on *Street* fails to recognize the different context of that case and the unusual difficulties this Court was trying to avoid therein. Unlike this case, *Street*, arose in the context of a *union*-shop agreement, where all employees were required to *join* the union, 367 U.S. at 749, as opposed to an *agency*-shop agreement where employees have the option of merely paying agency fees *without* joining the union.

The challenge in *Street* was brought by certain (apparently involuntary) union members who objected to the union spending their coerced dues on political activities. The obvious dilemma in *Street*, of course, was that because *all* employees were union members, it was difficult or impossible to tell which members had joined voluntarily and which had been coerced by the union shop agreement. It was that inability to distinguish between voluntary and involuntary union members, and the apparent (and likely accurate) assumption that most union members had joined of their own accord, that led

this Court to place the burden of dissent on the union *members*.[3]

But *Street*'s concern for the expressive interests of the union and its *voluntary members* has no applicability in *this* case given that § 760 does not apply to the use of union membership dues, but only to the use of nonmember agency fees. Such nonmembers – persons who have not, by definition, voluntarily associated with the union – are easily and properly distinguished from union members whose associational rights *inter se* are entirely unaffected by § 760. Unlike in *Street*, there is no need here for involuntary payors to raise their hands and object in order to separate themselves from the majority of voluntary union members – they are readily distinguished by their nonmembership. A presumption that they object to associating with the union for political purposes is entirely justified by their decision not to join the union, and such a presumption in no way burdens those whose support for the union can be presumed by the fact of their voluntary membership.[4]

---

[3] And, even so, such burden-shifting language was actually *dicta*, given that the *Street* case was brought by union members who had in fact actively dissented, 367 U.S. at 768, and hence this Court had no proper occasion to comment on the rights or obligations of persons who had not so dissented, but merely preferred silence.

[4] The court below also relies on *Abood* for the proposition that "the burden is on the employee to make his objection known." Op. ¶ 33. (citing 431 U.S. at 235-36). *Abood* held no such thing, however, and later, 431 U.S. at 237-40, merely described the holdings of *Street* and *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963), both of which involved union shops, not agency shops. What *Abood* did hold was that the nonmembers had a constitutional right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." 431 U.S. at 234. As for what remedy should be crafted to protect nonmembers, the court did not adopt the *Street* procedure but rather left the question unresolved, a point emphasized by Justice Stevens in his concurrence. *See* 431 U.S. at 242 n. 45 ("We express no view as to the constitutional sufficiency of the internal remedy described by the appellees."); *id.* at 244

The court's reliance below on *Street* and *Hudson* for the conclusion that the opt-out "approach accommodates the dissenting nonmember by providing an easy and prompt method of registering his or her objection and recouping any portion of fees which might otherwise be used by the union for political purposes," Op. ¶ 29, simply ignores the burden such an approach places on nonmember employees of having to recoup money that should never have been taken from them in the first place, ignores *Hudson*'s holding that a pure rebate approach is inadequate, 475 U.S. at 303-05, and utterly fails to accommodate the employee who would prefer to remain silent but instead is compelled to affirmatively repudiate the union and thus publicly take a stand in a workplace environment that is, by definition, already hostile to the nonmember employee. *Cf. Hurley* v. *Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 575 (1995) ("whatever the reason" for parade organizers not wanting to include a particular viewpoint in their parade, "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control").

By setting up a false dichotomy between nonmembers who silently *support* the union's political speech and those who *dissent*, the court below effectively denigrates those who

---

(Stevens, J., concurring) ("By joining the opinion of the Court, including its discussion of possible remedies, I do not imply nor do I understand the Court to imply that the remedies described in [*Street* and *Allen*] would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining."). The proper procedures for protecting nonmember rights were subsequently outlined in *Hudson*, discussed in detail above, and hence any mere implications the court below seeks to draw from *Abood*'s description of prior cases was plainly superseded by the holding in *Hudson*.

would simply prefer to exercise their right to silence *per se*. The proper inference from silence is *neither* assent to, nor dissent from, the union's political activities, but rather that silence is simply silence – the *absence* of speech and the *absence* of association. To the extent that silence in response to the *Hudson* packet represents a choice, it is the choice not to speak at all, to neither affirmatively associate nor affirmatively disassociate from the union, which is a choice equally protected by the First Amendment.

In the end, not only is an opt-in requirement, at a minimum, a *permissible* obligation to impose on the union relative to obviously non-germane fees, it in fact may be *insufficient* to protect nonmembers from paying such excess agency fees because the First Amendment forbids even the initial *collection* of such amounts in the first place.

II. The Union Has No Competing Associational Rights Relative to Nonmembers Who Have Not Elected to Associate with It.

Having substantially understated the nonmembers' First Amendment rights and protections, the court below then manufactured a supposedly competing union right to tax and spend such excess agency fees absent affirmative dissent from nonmembers. According to the court below, this Court supposedly "has held that a union has the right to use nondissenting nonmember fees for political purposes." Op. ¶ 47 (citing *Abood*, 431 U.S. at 240; *Allen*, 373 U.S. at 122). The court below inferred therefrom that a "presumption of dissent violates the First Amendment rights of both members and nonmembers." Op. ¶ 37.

But this Court has held no such thing regarding *nonmembers* of a union, and that manufactured right dramatically misunderstands *Street* and its brethren and the fact that those cases dealt with a union shop in which *all* employees were union members and there was no facial means of distinguishing voluntary members from involuntary ones absent an ex-

pression of dissent. *Street*'s concern with the expressive rights of the majority of (voluntary) union members stemmed precisely from that inability to identify the involuntary members without their speaking up, and, combined with *Hudson*, *Street* teaches the exact opposite lesson when dealing with nonmembers.

In contrast to the situation in *Street*, the statute here deals with *agency* shops, the employees protected by § 760 are all nonmembers, and there is no possibility whatsoever of intruding on the association rights of the union and its voluntary *members*. Whatever association rights a union has relative to its members, it has no such rights vis-à-vis employees who have conspicuously declined to join the union. The union is not entitled to any presumption of *assent* to its political use of excess agency fees that were compelled from the nonmembers and that are thus quite unlike potentially voluntary union dues. In *Street*, any remedy that applied *ex ante* to all union members would indeed burden the rights of voluntary members and the union, and placing the burden on dissenting union members would seem a simple matter of necessity given the difficulty of distinguishing voluntary from involuntary members.[5] In this case there is simply is no comparable diffi-

---

[5] Precisely because compelled membership, as opposed merely to compelled support, clouds the question of free association for purposes other than collective bargaining, one wonders whether union-shop arrangements are indeed constitutional. While *Hanson* and *Street* are often read as endorsing the constitutionality of union shop arrangements, this Court in *Abood* observed that "*Hanson* was concerned simply with the requirement of financial support for the union, and did not focus on the question whether the additional requirement of a union-shop arrangement that each employee formally join the union is constitutionally permissible. See *NLRB* v. *General Motors*, *supra*, 373 U.S. at 744 ('Such a difference between the union and agency shop may be of great importance in some contexts . . .') * * *. As the agency shop before us does not impose that additional requirement, we have no occasion to address that question." 431 U.S. at 217 n. 10. The questionable validity of compelling union *membership* casts doubt on *Street*'s concern for protecting the association rights of voluntary union members. Surely a less restrictive means of pro-

culty given that § 760 does not apply to union *members* at all. And nonmembers, of course, have plainly manifested their unwillingness to associate with the union by the simple fact that they have not joined the union. *Res ipse loquitur.*

Far from supporting union First Amendment rights relative to nonmembers, *Street*'s reasoning amply demonstrates the *absence* of such rights as to nonmembers.

Beyond its misreading of *Street*, the court below makes the bold and utterly false leap of logic that simply because the union *spends* agency fees on political activities, § 760 therefore "regulates the union's expressive association with agency fee payers." Op. ¶ 54 (citation omitted). But spending someone else's money on politics does not, by itself translate into political association. A thief who steals my wallet and then contributes the money to a political cause has not thereby entered into an "expressive association" with me; at least not a protected one. And the situation is no different here. (The fact that the union gives nonmembers a limited opportunity to object to such theft after it has already begun hardly makes it permissible in the first instance.) Any protected "expressive association" has to be bilateral, with members (or contributors) and groups affirmatively accepting each other as associates. Coerced association of nonmembers does not create "free" association with the union. And, given that silence is as valid a First Amendment option for an individual as assent or dissent, any cogent First Amendment theory must place the burden of demonstrating "association" where it belongs – on the party claiming association.

The court's further reliance below on the fact that the underlying agency-fee statute gives the union initial "possession" of excess agency fees, Op. ¶¶ 56-57, simply misses the

---

tecting the rights of both voluntary and involuntary members would be to use an agency shop rather than a union shop arrangement, whereby the difficulties of an overbroad restriction would be eliminated and the mere decision *not* to join the union would constitute dissent enough from compelling non-germane fees.

point. Even a statute granting such initial union possession of facially non-chargeable fees is itself unconstitutional as it fails to satisfy *Hudson's* "advance reduction" requirement. 475 U.S. at 303-04. Furthermore, even were such an initial overcharge a permissible, it still would not give the union any First Amendment rights to keep the money or to *presume* nonmember consent for such contributions. Mere initial possession in this context thus is no indication of any right or interest in the money – and the fact that nonmembers can opt out at all shows such excess amounts are not the union's money at all. The *timing* of the exercise of ultimate control cannot change ownership or give the union First Amendment rights it does not otherwise have.[6]

Aside from the fact that the union has no right to excess agency fees and no protected association with nonmembers absent their consent, it is also apparent that § 760 does not have the slightest chance of causing the majority to be "'silenced by the dissenters,'" Op. ¶ 31 (quoting *Street*, 367 U.S. at 773), because the majority – in this case the union members – remain free to pool their dues for whatever purpose they like. Section 760 does not silence the union or its membership, it merely denies them the use of *additional* monies that do not belong to them and which have not been freely given to them. This case thus does not involve the situation in *Street* where the interests of both the union and the dissenters must be protected "'to the maximum extent possible without undue impingement of one on the other.'" Op. ¶ 32 (quoting *Street*, 367 U.S. 773-74). Rather, § 760's opt-in requirement

---

[6] Furthermore, the initial agency-fee statute cannot be read alone, but must be read together with § 760, which negates the union's supposed rights absent nonmember consent. If the initial statute instead limited the union to exacting only chargeable expenses at the front end and then established a check-off option for the contribution of additional fees, the court's argument would be nonsensical. The fact that Washington does the same thing in a different order cannot change the constitutional analysis of excess fees to which the union has no entitlement in the end.

imposes no burden at all on the only valid association that exists – the association between the union and its members.

Similarly, any suggestion that the opt-in requirement burdens the union's rights to *solicit* the association of nonmembers is no less than Orwellian. Every association throughout society generally bears the burden of soliciting membership or contributions and of obtaining the affirmative consent of those being solicited. In this case, the union has already been given an unusual advantage in aid of their solicitation function by being given the contributions of nonmembers up front, rather than having to obtain affirmative action in the form of a donation. That they have to obtain some *affirmative* indicia of consent in order to keep the money they have thus extracted hardly places them at a disadvantage relative to the baseline faced by every other entity soliciting funds; it simply fails to give them the *further* advantage of a *presumption* of consent that does not operate in any other analogous circumstance. The State is under no obligation, constitutional or otherwise, to affirmatively facilitate the union's fundraising activities to give them greater advantages than all other associations. And the fact that they may have had such a greater advantage in the past (though it was unconstitutional), hardly gives them a claim of right to such special advantage when the State pares back on its gift.

Any union right to solicit contributions thus is not in the least bit implicated by § 760, except to the extent that the usual and ordinary burdens of such solicitation are in fact greatly reduced by the State when it authorizes excess agency fees at all, regardless whether there is opt in or opt out. The State has no duty to minimize union fundraising or solicitation costs, and it is certainly not imposing any unique costs on unions relative to what they would face were they left to their own devices without the State acting to withhold agency fees on their behalf. Such ordinary burdens and costs of solicitation are inherent in the very notion of "free" association, and

are a necessary corollary of the individual's liberty to enter into associations or not as he sees fit.[7]

While the union certainly has a right to solicit nonmembers, it does not have a right to *presume* nonmembers' desire to contribute without any response to its solicitation at all. A contrary rule would just be a perversion of the First Amendment.

Just as there is no burden on the union's right to solicit, neither is there any burden on a nonmember's right to contribute. Requiring nonmembers who wish to contribute to the union to affirmatively do so does not assume that nonmembers "disagree[]" with or "object[]" to the union's political activities, Op. ¶¶ 26, 39; it makes no assumption other than that it is the nonmember who should decide whether to *part* with his or her money. Whatever the reason for a nonmember failing to affirmatively contribute to the union – whether because of disagreement, disinterest, or ambivalence – such inaction properly defaults to the benefit of the individual, not the union, given that the agency fee is coerced to begin with. An expectation that contributions involve an affirmative choice does not create a burden on the right to contribute, it simply seeks minimal evidence of a desire to contribute, particularly in the context of nonmembers who have refused to otherwise associate with the union by becoming members.

With the court below having already claimed that the opt-out procedure used by the union creates no burden whatsoever on nonmembers who do not wish to support the union's non-germane political activities, it is simply inexplicable for the court to hold that the precise converse of that procedure is too burdensome. Op. ¶¶ 37-38. That holding is particularly

---

[7] To suggest that the ordinary incidents of solicitation that operate in every other context is a state-imposed burden on association rights gets the cart before the horse. There simply is no association at all until a nonmember has chosen to associate with the union, either by joining or by making a voluntary contribution.

strange given that it is far easier to opt in than to opt out. The opt-in decision need not be in writing, may be done at any time, and apparently need only be done once, not every year. The opt-out decision, however, must be in a written response to the *Hudson* packet, must be done within a narrow window of time, and must be repeated every year. Under such circumstances, it is absurd to claim that it is a greater burden for secretly supportive nonmembers to opt in to support for union political activities than it is for nonmembers who would prefer to remain silent and unassociated with the union to opt out.[8]

Finally, the suggestion that the union's previous opt-out procedures are constitutionally sufficient less restrictive alternatives for protecting nonmembers *assumes* that the union's rights are implicated in the first place and hence entitled to the benefit of such alternatives, and assumes the sufficiency of the prior opt-out procedures, which, as discussed in Part I, fail to satisfy the constitutional requirements set out in *Hudson*.[9]

---

[8] The court's related suggestion, Op. ¶ 29, that the opt-out approach "makes it simple for one who supports the political causes of the union, whether member or nonmember, to assert his or her right of association," ignores the fact that nonmembers have no right to such simplified procedures – which reduce the inherent costs of ordinary solicitation and response, in effect subsidizing the union's political fundraising efforts – ignores the precisely parallel increase in difficulty opt-out creates for employees wishing to remain silent or unaffiliated (which *is* a matter of right).

[9] The court's reliance on *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), which addressed control over membership, not relations with nonmembers, is particularly inapt in this case as, contrary to the claim below, § 760 does not "regulate[] the relationship between the union and agency fee payers with regard to political activity," Op. ¶ 50, because there is no *relationship*. The Boy Scouts asserting their own right to control membership is one thing, but one can hardly assert a right to presume everyone else in the world is a member unless they opt out.

If the court had given as much attention to the less restrictive alternatives for *protecting* nonmembers who have not consented to excess agency fees as it gave to imagining the need for alternatives to protect nonexistent union rights, it would have recognized that the opt-in procedure of § 760 *is* a less restrictive alternative *for nonmembers* – in that it reduces the burden of agency fees on their First Amendment rights and has no impact whatsoever on the State interest in collective bargaining or avoiding free riders. That is the proper analysis relevant to this case, not an attempt to protect a union's ability to keep coerced contributions to its political fund.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Washington should be reversed

Respectfully Submitted,

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER, P.C.
601 West Fifth Street, Suite 800
Los Angeles, CA 90071
213.617.0414

Counsel for Amici Curiae

Dated: November 13, 2006.

6287

Supreme Court, U.S.
FILED
NOV 8 - 2006
OFFICE OF THE CLERK

Nos. 05-1589 & 05-1657

IN THE

Supreme Court of the United States

DAVENPORT, *et al.*,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF *AMICI CURIAE* EVERGREEN FREEDOM FOUNDATION, CASCADE POLICY INSTITUTE, COMMONWEALTH FOUNDATION FOR PUBLIC POLICY, EXCELLENT EDUCATION FOR EVERYONE, GRASSROOT INSTITUTE OF HAWAII, GEORGIA PUBLIC POLICY FOUNDATION, JAMES MADISON INSTITUTE, JOHN LOCKE FOUNDATION, NEVADA POLICY RESEARCH INSTITUTE, PACIFIC RESEARCH INSTITUTE, PIONEER INSTITUTE FOR PUBLIC POLICY RESEARCH, SMALL BUSINESS HAWAII, AND COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONERS

ERIC B. MARTIN
Counsel of Record
HARRY J. F. KORRELL
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

Attorneys for Amici Curiae

QUESTION PRESENTED

Is the opt-out procedure approved by the Court in *Chicago Teachers' Union Local 1 v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986), the only method by which a state may protect the First Amendment rights of non-union employees from abuse by unions, or may the state provide additional protections such as Washington's opt-in procedure?

TABLE OF CONTENTS

Interest of *Amici Curiae* 1

Summary of Argument 5

Argument 6

I. The WEA is an Overtly Political Organization 6

A. The WEA is One of the Largest Campaign Spenders in the State of Washington 6

1. The WEA's History of Political Influence 6

2. Wash. Rev. Code §42.17.760 was Enacted to Protect Employee Association Rights Regardless of Viewpoint 8

B. Enforcement of the Statute Protects Individual Rights Without Unduly Restricting the WEA's Ability to Spend Money in Political Campaigns 11

II. An Opt-In Procedure Does Not Present an "Insurmountable Hurdle" 12

III. Given the Choice, Employees Choose Not to Contribute Their Pay to the WEA's Political Purposes 13

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Chicago Teachers' Union Local 1 v. Hudson, 475 U.S. 292 (1986) ..... *passim*

Statutes:

Wash. Rev. Code §42.17.610 ..... *8*
Wash. Rev. Code §42.17.620 ..... *8*
Wash. Rev. Code §42.17.760 ..... *passim*

Other Authority:

AG announces settlement in WEA campaign finance suit. Attorney General's Office (Feb. 27, 1998). *Available at* http://www.atg.wa.gov/releases/rel_wea_022798.html *9*

http://tpp.effwa.org/opeds/20.php *8, 13*

http://www.capitalresearch.org/pubs/pdf/LW0106.pdf *13*

http://www.teachers-vs-union.org/WA_v_WEA_Amicus_brief.pdf *13*

Lance T. Izumi, *Giving a Voice to Workers Why California Needs Paycheck Protection*, Pacific Research Institute, October 2005, *available at*: www.pacificresearch.org/pub/sab/entrep/2005/PaycheckProtect.pdf/ *12*

THE JEFFERSONIAN CYCLOPEDIA, 2267 (John P. Foley, ed. Russell & Russell, 1967) *4*

Opening Brief of Appellant, Washington Education Association, Washington State Court of Appeals, No. 28264-0-II *11*

Union settles campaign finance suit; WEA to pay $430,000 in agreement with state, Seattle P-I. Feb. 28, 1998, at A1. *Available at*

http://seattlepi.nwsource.com/archives/1998/9803010079.asp 9

Washington State Public Disclosure Commission, *PDC Election Financing Fact Book*, available at www.pdc.wa.gov/home/historical/publications/Factbooks.aspx 6

Washington Secretary of State, *Voter's Pamphlet, General Election 1992* 7

INTEREST OF *AMICI CURIAE*[1]

The Evergreen Freedom Foundation, founded in 1991, is a non-partisan, public policy research organization with 501(c)(3) status, based in Olympia, Washington. The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation's efforts center around core areas of state budget and tax policy, labor policy, welfare reform, education, citizenship and governance issues. To this end, the Foundation has promoted efforts to protect employees, including school teachers, from coerced political speech.

Following the enactment of Wash. Rev. Code §42.17.760 (the Fair Campaign Practices Act), the Foundation monitored the activities of, among others, the WEA to ensure compliance. The Foundation brought to the attention of local prosecutors and the State Attorney General the WEA's ongoing violations of the Act. In 1996, a complaint filed by the Foundation against the WEA resulted in the largest fine for campaign violations in state history. In addition, the Foundation filed the complaint that gave rise to one of these cases.

The Foundation's core mission, along with its history of tracking the activities of the WEA, place the Foundation in a unique position to provide the Court with important and relevant information regarding the nature of the WEA and the opt-in procedure approved by the voters of the State of Washington that is important for a proper understanding of the claims of the parties.

---

[1] Pursuant to Supreme Court Rule 37.6, this brief is filed with the written consent of all parties. *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made monetary contribution to the preparation of this brief.

The Cascade Policy Institute is a non-profit public policy research organization based in Portland, Oregon. Its mission is to explore and advance public policy alternatives that foster individual liberty, personal responsibility, and economic opportunity.

The Commonwealth Foundation for Public Policy Alternatives is a non-profit, non-partisan, research and educational institute based in Harrisburg, Pennsylvania. Dedicated to advancing the founding principles of limited constitutional government, economic and political freedom, and personal responsibility for one's actions, the Commonwealth Foundation conducts policy analysis and research to improve the lives of all Pennsylvanians.

Excellent Education for Everyone (E3) is a non-profit organization, made up of New Jersey citizens from across the political, racial, religious, ethnic, and regional spectrum dedicated to promoting choice and accountability in the public school system. It was founded in 1999 and works to ensure that all parents, regardless of income, have the power and the resources to decide where and in what way their children are educated.

The Grassroot Institute of Hawaii, founded in 2001, is a non-partisan, public policy research organization with 501(c)(3) status, based in Honolulu, Hawaii. The mission of the Grassroot Institute of Hawaii is to identify "people problems," such as barriers to productivity, wealth creation and personal happiness, and then study, analyze, publish and aggressively pursue creative self-government centered solutions. The individual and his or her search for meaning and happiness in a civil society is stressed. It is thus Grassroot, not Grassroots.

The Georgia Public Policy Foundation is an independent, public policy think tank. Formed in the fall of

1991, the Foundation's members are a diverse group of Georgians that share a common belief that the solutions to most problems lie in a strong private sector, not in a big government bureaucracy. The Foundation is a champion of personal and economic freedom and is committed to providing a free market perspective based on the principles of limited government, respect for the lives and property of others, and responsibility and accountability for one's actions.

The James Madison Institute is a Florida-based research and educational organization engaged in the battle of ideas. The Institute's ideas are rooted in a belief in the U.S. Constitution and such timeless ideals as limited government, economic freedom, federalism, and individual liberty coupled with individual responsibility. The Institute's mission is to keep the citizens of Florida informed about their government and to shape the state's future through the advancement of practical free-market ideas on public policy issues. The Institute achieves its mission through research, conferences and seminars, and a variety of publications.

Founded in 1990, the John Locke Foundation is a non-partisan 501(c)(3) public policy research center based in Raleigh, North Carolina. The John Locke Foundation's mission is to promote solutions to North Carolina's most critical challenges. The John Locke Foundation seeks to transform state and local government through the principles of competition, innovation and individual liberty, which principally requires the repeal or judicial invalidation of laws and regulations that restrict people from engaging in peaceful and voluntary activities or compel them to engage in activities they do not support.

The Nevada Policy Research Institute is a nonprofit organization dedicated to finding free-market solutions to state and local public policy problems. The Institute works to

help the people of Nevada appreciate the fundamental requirements of a free society. NPRI also directly provides the state's elected officials, Institute members, business leaders and journalists with independent research on matters essential to freedom. Priority goals include better schools, low taxes and an entrepreneur-friendly business climate for Nevada.

The Pacific Research Institute (PRI), located in San Francisco, California, is a non-partisan, non-profit, 501(c)(3) organization which was founded in 1979. PRI champions freedom, opportunity, and personal responsibility for all individuals by advancing free-market policy solutions. It demonstrates why the free market is more effective than government at providing the important results we all seek — good schools, quality health care, a clean environment, economic growth, and technological innovation. PRI puts "ideas into action" by informing the media, lawmakers, opinion leaders, and the public.

The Pioneer Institute for Public Policy Research is an independent, non-profit organization specializing in the support, distribution, and promotion of research on market oriented approaches to Massachusetts public policy issues.

Small Business Hawaii is a 501(c)(6) non-profit association and is dedicated to promoting a better Hawaii through private, competitive and networked small businesses. SBH aims to foster job creation, reduce taxes, government regulations, and business costs, while promoting, educating, and effectively fighting for Hawaii's small business community.

The Competitive Enterprise Institute (CEI) is a nonprofit organization founded in 1984 for the purpose of advancing free market solutions to regulatory issues.

SUMMARY OF ARGUMENT

"To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." – Thomas Jefferson.[2]

1. The WEA is much more than an organization of collective bargaining units representing teachers. It is also one of the largest political spenders in the State of Washington. The fact that the WEA and other organizations used funds collected from their members (and in the case of the WEA from non-members) led directly to the adoption of the employee protections of Wash. Rev. Code §42.17.760. Enforcement of Wash. Rev. Code §42.17.760 will protect the First Amendment rights of employees without restricting the ability of the WEA to participate in elections.

2. Far from being an "insurmountable hurdle," the opt-in requirement of Wash. Rev. Code §42.17.760 can be easily implemented with a minor change to the existing *Hudson* opt-out process and will have only a minimal impact on the WEA's ability to collect truly voluntary contributions for political use.

3. The Court should not adopt the WEA's argument that consent by nonmembers to expenditures can be presumed, as history demonstrates that even members of the WEA, when given the option, choose not to support the political activities of the WEA.

---

[2] THE JEFFERSONIAN CYCLOPEDIA, 2267 (John P. Foley, ed. Russell & Russell, 1967).

ARGUMENT

I. The WEA is an Overtly Political Organization

A. The WEA is One of the Largest Campaign Spenders in the State of Washington

While the WEA attempts to paint itself as a labor organization that engages in some minor incidental political spending, the facts demonstrate otherwise. The WEA is one of the top political spenders in the State of Washington, regularly contributing hundreds of thousands of dollars to candidates and ballot issues. This political power and its obvious potential for abuse is a natural subject for regulation by the people of the State of Washington. And despite the dire predictions of the WEA, the enactment of Wash. Rev. Code §42.17.760, if enforced, will not unduly restrict WEA's ability to spend political funds collected voluntarily from members. At the same time, it provides additional protections for the First Amendment rights of employees not to associate with political viewpoints with which they may disagree.

1. The WEA's History of Political Influence

Chapter 42.17 of the Revised Code of Washington, the chapter in which the challenged statute is codified, is a comprehensive set of statutes regulating elections and providing for governmental accountability. Among other regulations, that chapter requires that entities spending money on behalf of candidates or political positions register and disclose their expenditures. The Foundation has analyzed these reports, all publicly available at www.pdc.wa.gov, and determined that the WEA is one of the most prolific spenders in Washington State politics.

Since 1996, the WEA has ranked among the top five contributors to executive office campaigns in the State of

Washington.[3] During that time, the WEA also ranked among the top 50 contributors to state legislative campaigns and was one of the top twenty-one contributors of "soft money" to the Washington State Democratic Party.[4] The WEA Political Action Committee (WEA-PAC) was the most active political action committee spender in every election from 1996 through 2002, with the exception of 1998, where it was the second most active PAC – not because it reduced spending, but because its spending was eclipsed by another union group.[5]

The WEA's influence is not limited to candidate elections. From 2000 through 2005, the WEA and its PAC reported spending over $1.6 million for or against various initiatives and referenda.[6] As of October 23, 2006, the WEA had spent over $455,000 opposing two ballot measures on the November 2006 ballot.[7]

Altogether, including direct cash donations and in-kind contributions, between 2000 and 2005, the WEA and its PAC reported spending nearly $4 million to influence elections in Washington State.[8] During the 2006 campaign cycle, the WEA and its PAC spent over $1.1 million.[9]

In addition to direct spending, the WEA exerts its influence through paid lobbyists. In fact, with the exception of 2004-05, in every year since 2001, one of WEA's lobbyists was among the top four lobbyist spenders in the

---

[3] Washington State Public Disclosure Commission, *PDC Election Financing Fact Book*, available at www.pdc.wa.gov/home/historical/publications/Factbooks.aspx.

[4] Id.

[5] www.pdc.wa.gov.

[6] Id.

[7] Id.

[8] Id.

[9] Id. as of October 23, 2006.

state.[10] Since 2001, WEA lobbyists have reported spending a total well exceeding $4 million.[11]

2. Wash. Rev. Code §42.17.760 was Enacted to Protect Employee Association Rights Regardless of Viewpoint

The WEA consistently argues that Wash. Rev. Code imposes a viewpoint-based restriction on political speech. The State and other *amici* will adequately address these erroneous contentions, However, due to its long-term involvement in monitoring compliance with Wash. Rev. Code §42.17.760, the Foundation has a unique understanding of the motivation and purposes of that measure.

In 1992, the voters of the State of Washington were alarmed by the skyrocketing increases in political spending, which, in the previous election cycle, had reached an all-time high.[12] Even more alarming was the fact that just 20% of campaign contributions came from individuals. Political action committees, corporations, labor unions, and special interest groups were dominating the most fundamental political process.[13] The people of the state were concerned by the lack of accountability of large donors and the disparity in power between individuals and entities permitted to make large campaign donations.[14]

In order to address these concerns, voters of the State of Washington enacted Initiative 134, the Fair Campaign Practices Act. The act included specific findings that the financial strength of organizations should not permit them to exercise a disproportionate or controlling influence on

---

[10] Id.
[11] Id.
[12] Washington Secretary of State, *Voter's Pamphlet, General Election 1992.*
[13] Id.
[14] Id.

elections.[15] It further found that the rapid increase in donations from organizations created a public perception that individuals had an insignificant role in elections while large donor organizations improperly influenced public officials.[16] The Initiative provided for maximum contribution limits from corporations and other organizations, implemented restrictions on political fundraising and spending, and required additional reporting. Among the new provisions was the mandatory opt-in procedure, at issue here. The intent of that provision, which was codified as Wash. Rev. Code §42.17.760, was to protect the First Amendment associational rights of employees and other individuals.[17]

The initiative had tremendous public support, resulting in approval by over 72% of the state's electorate. While most entities regulated by the Fair Campaign Practices Act readily conformed to the new regulations, a few entities, most notably the WEA, demonstrated consistent resistance:

- In 1996, the WEA was charged with three violations of Wash. Rev. Code §42.17. First, the WEA and WEA-PAC failed to properly disclose a $162,255 donation from the WEA to WEA-PAC; second, WEA and WEA-PAC failed to disclose $170,000 contributions from WEA to WEA-PAC; and third, WEA formed a second political action committee, the Community Outreach Program, which did not file as a political committee. The State of Washington brought suit against the WEA, ultimately agreeing to a $430,000 settlement: $330,000 was refunded to members, $80,000 was paid as a penalty, and $20,000 was paid in costs and attorneys'

---

[15] Wash. Rev. Code §42.17.610-620.

[16] Id.

[17] See http://tpp.effwa.org/opeds/20.php, quoting the 1992 voter's guide.

fees.[18] Richard Heath, senior assistant attorney general, said it was the largest penalty assessed for campaign violations in the history of the state.[19]

- In 1997, a WEA lobbyist was cited for violations of Wash. Rev. Code §42.17.150, 42.17.155, and 42.17.170 for twenty-three monthly reporting violations, for falsely reporting her employer as the WEA, and for failing to timely report four political contributions.

- Also in 1997, the WEA Executive Director was cited for violations of Wash. Rev. Code §§42.17.150, .155, and .170 for 108 false monthly reports, and sixty reporting violations for falsely reporting his employer as the WEA. He was fined $6,000 with $2,000 suspended.

- In late 1997, the WEA and NEA were charged with concealing the source of political contributions by funneling $410,000 through WEA.

- In 1999, the WEA was fined $15,000 for failing to disclose, as part of discovery in a lawsuit, the union's political plan for the 1996 elections.

- In 2004, three WEA local building representatives were fined for using public facilities to promote a statewide ballot measure in violation of Wash. Rev. Code § 42.17.130.

The purpose of Initiative 134 was to promote fairness and openness in Washington's election process. It enacted

---

[18] *AG announces settlement in WEA campaign finance suit.* Attorney General's Office (February 27, 1998). *Available at* http://www.atg.wa.gov/releases/rel_wea_022798.html.

[19] *Union settles campaign finance suit; WEA to pay $430,000 in agreement with state*, Seattle P-I. February 28, 1998, at A1. *Available at* http://seattlepi.nwsource.com/archives/1998/9803010079.asp.

generally applicable regulations that do not burden any particular viewpoint. Among those regulations is a simple requirement that non-union members cannot be forced to support financially and thus associate with the political viewpoints of a union without their express consent. While most regulated entities have found no difficulty in both continuing their political activities and adhering to the law, the WEA refuses to comply.

B. Enforcement of the Statute Protects Individual Rights Without Unduly Restricting the WEA's Ability to Spend Money in Political Campaigns

Amici support the rights of individuals and organizations to participate in the political process and do not advocate any rule that would prevent that participation so long as it is funded by truly voluntary contributions. While the WEA implies that prohibiting use of non-member dues for political purposes would have a devastating effect on the WEA's right to political speech, the facts belie this claim. Based on the WEA's submissions to the court below, the limitations of Wash. Rev. Code §42.17.760 will uphold the individual rights of teachers and not burden the union's ability to advocate on behalf of informed teachers who voluntarily contribute to its political efforts.

The provision at issue prohibits collection of money to be used for political purposes only from non-union members who have not given permission for such use. The fees from union members are not at issue, and the union can still collect from non-members with the non-members' consent. The WEA has approximately 70,000 members and fewer than 3,500 non-member fee payers.[20] Even if every non-member declined to opt-in to the use of dues for political purposes,

---

[20] Trial Exhibits ("Ex.") 57-61; Report of Proceedings ("RP") 178-80; Clerk's Papers ("CP") 105.

the impact to the WEA would amount to less than $\frac{1}{4}$ of 1% of the WEA's total expenditures.[21]

For the 2004-05 school year, WEA dues were $318.[22] Of that, 27%, or $85.86, went towards all "non-chargeable" purposes.[23] Assuming that not one of the 5% of non-member employees would opt-in to the non-chargeable expenses, the total loss of revenue to the WEA would be only 27% of the 5% of total dues collected from non-members – a net of 1.35% of dues. In fact, because the WEA "collects significant revenues from other sources,"[24] and because the amount spent on political activities represents less than 5% of the WEA's total expenditures,[25] the actual percentage of revenue collected from non-union members and used for political purposes is actually much smaller. Such a miniscule drop in funds available for political purposes hardly has the crippling effect complained of by the WEA and is a small price to pay to protect teachers from forced support of political speech with which they disagree.

II. An Opt-In Procedure Does Not Present an "Insurmountable Hurdle"

The WEA repeatedly argues that implementation of an opt-in procedure for non-members presents an "insurmountable" administrative burden. The truth is otherwise. The requirements of the Fair Campaign Practices Act can readily be implemented by adapting the existing

---

[21] Opening Brief of Appellant, Washington Education Association, Washington State Court of Appeals, No. 28264-0-II.

[22] In addition, dues of $137 were charged for membership in the National Education Association and additional dues were charged for membership in local and regional dues. See letter, appendix A.

[23] See letter, appendix A. That percentage is similar to previous years. CP 175.

[24] Ex. 156. See also, Opening Brief of Appellant to Washington State Court of Appeals, No. 28264-0-II.

[25] Id.

Hudson packet procedure. In fact, a recent study demonstrates that it is easier for employees to opt-in than it is for them to opt-out.[26] The study also found that an opt-in plan increases union communication with employees and ensures all contributions are voluntary. *Id.*

Currently the WEA sends an annual *Hudson* packet (after *Chicago Teacher's Union Local 1 v. Hudson*, 475 U.S. 292 (1986)) to every non-member.[27] That packet is designed to meet the minimum requirements set forth in *Hudson* and contains information about union membership, activities, and benefits, and explains the procedures required for employees to opt-out of union membership.[28] The Fair Campaign Practices Act could be readily satisfied by including a simple form allowing non-members to indicate their desire to have their fees used for the political purposes of the WEA. Something as simple as a postcard with a box to check would meet the minimal protections required by the Act. Any protestation that the "burden" imposed by the Act is "insurmountable" defies common sense.

III. Given the Choice, Employees Choose Not to Contribute Their Pay to the WEA's Political Purposes

The WEA argues that the Court should presume that nonmembers who do not stand up and object actually consent to the use of their dues for political purposes. But experience shows that silence does not mean consent. Perhaps the most important point the Court should consider in this regard is

---

[26] Lance T. Izumi, *Giving a Voice to Workers Why California Needs Paycheck Protection*, Pacific Research Institute, October 2005, *available at*: www.pacificresearch.org/pub/sab/entrep/2005/PaycheckProtect.pdf.

[27] A typical *Hudson* letter is attached as appendix A.

[28] Notably, the union deems it unnecessary to include a simple opt-out form or a pre-addressed envelope, having determined to impose the "administrative burden" on the employees.

that when given the option to donate to the political purposes of the WEA, even union members elect not to donate.

The enactment of the Fair Campaign Practices Act forced the WEA to stop requiring a member donation to the WEA-PAC unless the union first received affirmative consent to the donation from the member. Prior to the enactment of the law, approximately 82% of the WEA membership donated to the WEA-PAC and only 18% affirmatively opted out. Opting out required an affirmative action by the union member, causing that member to "stand out" from his or her colleagues, potentially bringing unwanted attention and pressures to the member.[29] However, after removing the pressures imposed by the opt-out system, member participation in the WEA-PAC dropped to between 11% and 18%.[30] Such results are not unique to Washington. After enacting similar laws, member participation in PACs in Utah fell from 68% to 7%,[31] and participation in Idaho fell by 75%.[32] When informed of their right to opt-out of union political contributions, the number of members opting out in Colorado increased four-fold.[33] Thus even those who elected to become union members, who can reasonably be presumed to share many of the WEA's political views (at least more so than those who opted not to join), when given a choice free of the coercion and exposure endemic to the opt-out system, chose not to support the political activities of the WEA.

---

[29] See *amicus* brief of Association of American Educators.

[30] See http://tpp.effwa.org/opeds/20.php.

[31] See http://www.capitalresearch.org/pubs/pdf/LW0106.pdf. The drop in Utah and Idaho is even more significant as these are right to work states and do not mandate payment of union fees.

[32] See http://www.capitalresearch.org/pubs/pdf/LW0106.pdf, noting that in 2004, the Independence Institute, a Colorado-based free market think tank began informing Colorado teachers union members of their right to opt-out of the expressly political union dues. The number of teachers choosing to opt-out increased more than fourfold after the first year of these efforts.

[33] See http://www.teachers-vs-union.org/WA_v_WEA_Amicus_brief.pdf.

While the WEA chants the mantra of "dissent cannot be implied," the Court should not presume that those who affirmatively chose not to become union members assent to the WEA's political activities when those who are members overwhelmingly decline to contribute to the political activities of that organization.

CONCLUSION

The people of the State of Washington determined that employees needed additional protection from the use of their hard earned pay for political purposes with which they might not agree. They enacted a law by an overwhelming margin, codifying what seems to be a simple premise: If an organization wants to use an employee's money for political purposes, it must have that employee's permission. While the great majority of organizations affected by this law have fallen into line and have remained fully active in the political process, the WEA refused to comply. Perhaps because it cannot muster the support of more than 20% of its own members for its political activities, the WEA instead raises the specter of repressed speech and administrative burdens. The Court should reject these unfounded fears and respect the will of the voters of Washington by reversing the Supreme Court of the State of Washington and holding Washington's opt-in procedure constitutional.

Respectfully submitted,

Eric B. Martin
Counsel of Record
Harry J. F. Korrell
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

November 8, 2006

Attorneys for Amici

APPENDIX

APPENDIX — LETTER FROM ARMAND L. TIBERIO, EXECUTIVE DIRECTOR OF THE WASHINGTON EDUCATION ASSOCIATION TO CERTIFICATED AND AHE AGENCY FEE PAYERS DATED OCTOBER 8, 2004

WEA
WASHINGTON
EDUCATION
ASSOCIATION

32032 Weyerhaeuser Way S.
Federal Way, WA 98001-9687
mailing address: P.O. Box 9100
Federal Way, WA 98063-9100

telephone: 253-941-6700
toll free: 800-622-3393
fax: 253-946-4692

www.washingtonea.org

Charles Hasse, President
David Scott, Vice President
Armand L. Tiberio, Executive Director

TO: **Certificated and AHE Agency Fee Payers**

FROM: **Armand L. Tiberio, Executive Director**

DATE: **October 8, 2004**

RE: **2004/05 AGENCY FEE**

The records of the Washington Education Association (WEA) indicate that you are not currently a member of the WEA, which also means that you are not a member of the National

Appendix

Education Association (NEA) or your Local Education Association (LEA) and affiliated UniServ Council. As a nonmember, you pay an agency fee to the associations to help defray the expense of providing collective bargaining services that benefit association members and nonmembers alike. You have certain legal rights as a nonmember, and one of the purposes of this letter is to inform you of those rights.

But rather than paying agency fees as a nonmember, we urge you to consider joining the more than 75,000 of your fellow educators and school employees who have become members of WEA and its affiliates, and who participate fully in the associations' activities. You can become a member of the NEA, WEA, and your affiliated UniServ Council and LEA by completing the enclosed WEA Membership Enrollment Form and returning the same to the WEA, Attn. Membership Services, P.O. Box 9100, Federal Way, Washington, 98063-9100.

There are certain services available to members that you will not receive as an agency fee payer or non-member. One of these is the Educators Employment Liability Insurance Policy. This policy provides up to $1,000,000 insurance if a member is sued on the basis of employment related activities. Under certain circumstances, it also provides up to $35,000 to pay attorney's fees if a member is charged with a crime related to employment. Additionally, WEA members receive a discount on personal legal services, such as wills, probate, domestic relations, and real estate matters; agency fee payers do not receive this discount. Moreover, pursuant to the terms of the WEA Legal Defense Policy, WEA may provide an attorney to defend its members when their employer seeks to discharge

or non-renew or takes other action adverse to the member's contractual rights; agency fee payers are not eligible for legal services.

WEA members are eligible to participate in Association trainings concerning a wide range of issues affecting the employment rights, benefits and compensation of public education employees. One such training is the annual WEA Leadership Academy which provides instruction on issues ranging from member advocacy and mediation/grievance skills to classroom management and instructional issues. Association members may vote on contract ratifications, may vote in internal union elections to select Association leaders and may help shape the policy and direction that the Association takes on your behalf. Only Association members are eligible to hold elected Association offices and positions, to serve as building representatives, or to serve on joint Association-Employer committees. In addition, only WEA members are eligible for a wide range of member benefits provided through the NEA, such as discount buying, credit cards, etc.

State statutes, RCW 41.59.100 (certificated) and RCW 28B.52.045 (AHE) allow your Local Education Association, an affiliate of the WEA and the NEA, to negotiate an agency fee provision in a collective bargaining agreement. This law states that the school or college district shall deduct (and forward to the education association) from the salary of those who choose not to become Association members an agency fee equal to the amount of dues paid by Association members.

Appendix

WEA membership dues for the 2004/05 school year are $318.00, plus $12.00 dues for political education and a $12.00 special assessment to explore legal action against the state to require it to fully fund public education. Agency fee payers, however, do not pay the $12.00 dues devoted to political education, or the $12.00 special assessment. WEA members may choose to pay, in addition to WEA dues, $20.00 per year for contribution to the WEA Political Action Committee, WEA-PAC. These monies are used for state and local elections, supporting candidates. No agency fees go to WEA-PAC. As an agency fee payer, the WEA-PAC contribution will not be deducted from your paycheck and you will not be asked to contribute to WEA-PAC.

WEA members pay dues to WEA, a Local Education Association, a UniServ Council, and the National Education Association (NEA). This is because in our experience, the multi-level structure best enables the Association to provide representational services most efficiently without overlapping.

In addition to the WEA agency fee, you will also be required to pay an agency fee to the NEA, and, if they choose to collect one, to your LEA and UniServ Council. The amount of Local dues can be found by referring to **Appendix A***, which lists locals in alphabetical order. The amount of UniServ Council dues can be found by referring to **Appendix B**, which lists councils in alphabetical order.

---

* Appendix A is the 2003-04 local dues data, the most current available at time of printing.. You should contact your local association to determine whether the local dues rate has changed for 2004-05.

Appendix

NEA membership dues for the 2004/05 school year are $137.00; no dues go to the NEA-Fund for Children in Public Education (NEA-FCPE). NEA members may choose to pay, in addition to dues, $12.00 per year as a contribution to the political fund, NEA-FCPE. These monies are used to contribute to federal political campaigns for pro-education candidates. No agency fees are directed to NEA-FCPE; as an agency fee payer, the NEA-FCPE contribution will not be deducted from your paycheck and you will not be asked to contribute to NEA-FCPE.

The agency fee pays for many important services of benefit to you; the following is a partial list of such services.

1. The Association represents you in your employment in relationship with your employer.

2. Association staff or leaders bargain a collective bargaining agreement on behalf of all members of your bargaining unit that controls your wages, hours and other terms and conditions of employment.

3. Should your employer violate the collective bargaining agreement in its treatment of you, the Association can file a grievance on your behalf.

4. If you are called in for a disciplinary interview with your supervisor or other administrator, you may request Association representation during the interview.

5. WEA negotiates with insurance companies, such as Blue Cross/Blue Shield, so that such companies will design

insurance packages to meet the unique needs of school employees, and so that such packages will be marketed to school districts at the lowest possible price.

6. WEA sponsors many courses and workshops to train local leaders to protect the rights of members and agency fee payers.

This is not an exhaustive list of services you receive from WEA, your Local Association, your UniServ Council and NEA.

If you as an agency fee payer object to the Association spending any part of your agency fee on political or ideological activities not related to collective bargaining or contract administration and enforcement, or on services which agency fee payers do not receive, you will *not* be charged for these activities and services. You will, however, *be* charged for expenditures for activities related to bargaining, contract administration and enforcement, and improving your working conditions. A list of items we view as chargeable and nonchargeable is set forth in **Appendix C**.

In the past, WEA has expended money on pro-public education ballot propositions, including school levies, bonds and initiatives, such as those to reduce class size and increase school employees' salaries. These expenditures are non-chargeable.

If you decide not to become a member of the Association, you have three options as a nonmember: (1) you may pay the full amount equal to dues paid by members; (2) you may

object to use of your agency fee for nonchargeable activities but accept the Association's determination of the amount of the fee that is chargeable as is set forth in this letter; or (3) you may choose to object to the use of your agency fee for nonchargeable activities and challenge the Association's calculation of the amounts that are chargeable and nonchargeable, and/or our characterization of items as chargeable or nonchargeable, before an impartial arbitrator. If you choose option (2) or (3), you will receive a rebate check equal to the amount of the fee that the Association has determined to be non-chargeable. If you choose option (3), the Association bears the burden of proving to the arbitrator that any particular expenditure was chargeable to agency fee payers, which may result in the arbitrator awarding a different amount to be rebated.

You may object by notifying Armand L. Tiberio in writing at the following address:

Armand L. Tiberio, Executive Director
Washington Education Association
P.O. Box 9100
Federal Way, Washington 98063-9100

The objection must contain the following information:

1. Your name, home address, school and home telephone numbers.

2. The type of position in which you are employed (i.e., community college faculty, K-12 teacher, etc.).

Appendix

3. Whether you are employed part time, full time, or as a substitute.

4. The name of the school district or college by which you are employed and the name of the WEA affiliate which is the collective bargaining representative for the bargaining unit in question.

5. If you wish to challenge the Association's calculation of the amounts that are chargeable and nonchargeable, or our characterization of items as chargeable or nonchargeable, your objection letter must state that you wish to "*challenge*".

If such written objection has not been postmarked by **Thursday, November 11, 2004** you will waive your ability to object.

Only a single general statement of objection and/or challenge is necessary each year to object to and/or challenge the WEA agency fee, the NEA agency fee, the LEA agency fee, and the UniServ Council agency fee.

In considering whether you wish to object to the amount of the fee, please examine the following documents:

1. **Appendix D**. The description of the WEA expenditure budget for the 2002/03 fiscal year.

2. **Appendix E**. WEA chargeable and nonchargeable expenditures by budget area for 2002/03.

Appendix

3. **Appendix F**. The audited statement of WEA expenses in the 2002/03 fiscal year, which includes the auditor's review of the chargeable/nonchargeable calculations.

4. **Appendix G**. How WEA calculates its agency fee.

5. **Appendix H** (if applicable). If your UniServ Council is seeking to collect an agency fee: 1) A declaration from an officer or staff member of the Council, explaining the operation of the Council and its financial records, and incorporating the Council's 2002/03 year-end financial statements, including its breakdown of expenditures into chargeable and nonchargeable categories, and; 2) an independent audit of the Council's 2002/03 expenditures.

6. **Appendix I** (if applicable). If your Local Association is seeking to collect an agency fee, enclosed are: 1) a declaration from an officer of your Local Association, incorporating and explaining its 2002/03 financial and time keeping records, including its breakdown of expenditures into chargeable and nonchargeable categories; 2) If your Local has more than 750 members, an independent audit of the Local's 2002/03 expenditures; 3) if your Local has less than 750 members, but more than 200 members, a independent compilation report for the Local's 2002/03 expenditures; and 4) if your Local has 200 or fewer members, either a compilation report for the Local's 2002/03 expenditures, or if no compilation report, then you may request the opportunity to inspect your Local's 2002/03 financial records by contacting the Local President prior to Thursday, November 11, 2004.

Appendix

7. **Appendix J.** NEA cover memorandum.

8. **Appendix J-1.** NEA chargeable and nonchargeable audited expenditures for the 2002/03 fiscal year.

9. **Appendix J-2.** The audited NEA financial statement as of August 31, 2002 and 2003. This is an independent auditor's statement of expenditures made by the NEA.

If your local association is seeking to collect an agency fee, the percentage of local dues that an objector will pay differs depending on whether the association has more or less than 850 members. If your local association has *more* than 850 members, an objector will pay the actual percentage of local dues identified as "chargeable" in the enclosed local association declaration. If it has *less* than 850 members, an objector will pay WEA's chargeable percentage of local association dues as an agency fee, or the actual percent of local dues identified as chargeable in the enclosed local association declaration, whichever is less, unless that local association had an audit done of its 2002/03 expenditures. If an audit was performed (in which case the audit report is enclosed), an objector will pay the actual percentage of local dues identified as "chargeable" in the enclosed local association declaration.

The agency fee charged by the UniServ Council is the percentage of dues identified as chargeable in the enclosed council declaration.

For 2004/05, the agency fee charged by WEA is 73% of dues. For 2004/05, the agency fee charged by NEA is of 54% dues.

Appendix

In March of 1994, WEA presented evidence to an arbitrator to justify the application of WEA's chargeable percent to its councils and locals. At the arbitration, WEA presented evidence of the expenses of a number of local associations. The arbitrator ruled that WEA could use WEA's chargeable percent to calculate the chargeable fee of those locals because:

> *The evidence at the hearing made it clear that the Locals . . . , because of their basic mission, must spend at least as much time, if not more, on representational issues. The staff and elected officers of these organizations must spend their time meeting with employer representatives to discuss issues of employee concern. They also spend a great deal of time meeting with individual employees with accusation, complaint, or grievance. And, as stated, they spend virtually no time in the most significant non-chargeable areas; being political action and public relations. I agree with the Associations (keeping in mind the Hudson admonishment that "absolute precision" is not required) that the local presumption option, which has been endorsed by some courts, is a valid alternative.*

Accordingly, that arbitrator ruled that each of the locals could use WEA's chargeable percent. Four other arbitrators have also permitted the Association to use WEA's chargeable percent to estimate the locals' agency fee in this notice. In addition, use of WEA's chargeable percentage to estimate the agency fees for objectors in locals with fewer than 850 members was approved in 1998 by the U.S. District Court (W.D. Wash) as part of a settlement of a class action lawsuit.

Appendix

If you have a genuine, religious belief that prevents you from paying a representation fee to the WEA, NEA and its affiliates, you must send written notification to the following address:

Armand L. Tiberio, Executive Director
Washington Education Association
P.O. Box 9100
Federal Way, Washington 98063-9100

Your written notification must specify the nature of your genuine, religious belief that prevents you from paying representation fees to the Association and must specify the non-religious charitable organization to which you would like the amount equivalent to fees to be paid. Your Local Education Association will then decide whether or not to grant your request for religious objector status, and if granted, will contact you to determine a mutually agreeable non-religious charitable organization to which an amount equal to your full 2004/05 membership dues will be paid.

Please examine the enclosed material and reflect for a moment on the services that the Association provides agency fee payers. I am confident that if you do so, you will agree that the Association delivers services worth the full amount of Association dues.

Enclosures
g:\mgawley\agency fee\2004-05\hudson packet

(620 A

Nos. 05-1657, 05-1589

In The
Supreme Court of the United States

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

DAVENPORT,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
MICHAEL BINDAS
811 First Avenue, Suite 625
Seattle, Washington 98104
Telephone: (206) 341-9300
Facsimile: (206) 341-9311

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
901 North Glebe Road
Suite 900
Arlington, Virginia 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. PROVIDING ASSOCIATIONAL PROTECTIONS TO NONMEMBERS DOES NOT VIOLATE OR EVEN IMPLICATE A UNION'S FIRST AMENDMENT RIGHTS	4
A. Section 760 And Agency Shop Agreements	6
B. The Washington Supreme Court's Decision Misinterpreted This Court's Holdings	8
C. Section 760 Does Not Implicate Any Constitutional Rights Possessed By the Union And No First Amendment Scrutiny Is Necessary	10
II. SECTION 760 PROTECTS THE RIGHTS OF NONMEMBERS TO REFUSE TO ANNOUNCE THEIR POLITICAL VIEWS	12
III. A CONCLUSION THAT "DISSENT IS NOT TO BE PRESUMED" IS NEITHER CONSTITUTIONALLY NOR LOGICALLY REQUIRED	18
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).....*passim*

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)..... 12

Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen, 373 U.S. 113 (1963).....7, 8, 18

Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 91 (1982)..... 13

Buckley v. Valeo, 424 U.S. 1 (1976)..... 13

Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986)..... 7, 19

Cochran v. Veneman, 359 F.3d 263 (3d Cir. 2004), *vacated and remanded sub nom. Johanns v. Cochran*, 544 U.S. 1058 (2005) 1

Commc'ns Workers of Am. v. Beck, 487 U.S. 735 (1988)..... 7

Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees, 466 U.S. 435 (1984)..... 7, 8

Gilpin v. Am. Fed'n of State, County, and Mun. Employees, AFL-CIO, 875 F.2d 1310 (7th Cir. 1989)..... 19

In re Harrison, 461 A.2d 1034 (D.C. App. 1983)..... 6

Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961).....7, 8, 10, 18

Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005)..... 1, 5

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991)..... 7, 9

TABLE OF AUTHORITIES – Continued

Page

May v. McNally, 55 P.3d 768 (Ariz. 2002), *cert. denied*, 538 U.S. 923 (2003) 1

McConnell v. Federal Election Commission, 540 U.S. 93 (2003) 1

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 13

Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) 5

Randall v. Sorrell, ___ U.S. ___, 126 S. Ct. 2479 (2006) 1

Ry. Employees' Dept. v. Hanson, 351 U.S. 225 (1956) 7

Shelton v. Tucker, 364 U.S. 479 (1960) 16

W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 5

Wisconsin Right to Life, Inc. v. Federal Election Commission, ___ U.S. ___, 126 S. Ct. 1016 (2006) 1

STATUTES

Wash. Rev. Code § 28B.52.045(2) 7

Wash. Rev. Code § 41.56.122(1) 7

Wash. Rev. Code § 41.59.060 8

Wash. Rev. Code § 41.59.100 7

Wash. Rev. Code § 42.17.760 ..... *passim*

OTHER MATERIALS

Aron Gregg, *The Constitutionality of Requiring Annual Renewal of Union Fee Objections in an Agency Shop*, 78 Tex. L. Rev. 1159 (2000) 17

TABLE OF AUTHORITIES – Continued

Page

Compulsory Union Dues and Corporate Campaigns: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and the Workforce, 107th Cong. (2002) 16

H.R. Rep. No. 105-397 (1997) 15

John Stuart Mill, *On Liberty*, in *Mill: A Norton Critical Edition* 65 (1997) 16

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 13

INTEREST OF THE AMICUS

Pursuant to Rule 37.3 of this Court, the Institute for Justice (the "Institute") respectfully submits this amicus curiae brief in support of Petitioners State of Washington Public Disclosure Commission and Gary Davenport, *et al.*[1]

The Institute is a nonprofit public interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The Institute litigates First Amendment cases throughout the country and files amicus curiae briefs in important cases nationwide, including this Court's decisions in *Randall v. Sorrell*, __ U.S. __, 126 S. Ct. 2479 (2006), *Wisconsin Right to Life, Inc. v. Federal Election Commission*, __ U.S. __, 126 S. Ct. 1016 (2006), and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). The Institute regularly brings cases on behalf of individuals whose right to speak and associate has been infringed by the actions of the government. In particular, the Institute has represented plaintiffs in a number of actions challenging governmental regulations that compel individuals to finance speech with which they disagree. *See Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), *vacated and remanded sub nom. Johanns v. Cochran*, 544 U.S. 1058 (2005) (suit challenging Dairy Promotion Stabilization Act); *May v. McNally*, 55 P.3d 768 (Ariz. 2002), *cert. denied*, 538 U.S. 923 (2003)

---

[1] The Institute has received consent from counsel of record pursuant to Sup. Ct. R. 37.3, as submitted with this brief. The Institute affirms, pursuant to Sup. Ct. R. 37.6, that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

(suit challenging public financing of campaigns under Arizona's Citizens Clean Elections Act).

The Institute believes that its legal perspective and experience will provide additional considerations regarding this issue that are not contained in the briefs of the parties.

SUMMARY OF ARGUMENT

This case concerns statutory protections of workers in an "agency shop" who (i) chose not to join the union, and (ii) refuse to support that union's political agenda. The Institute will show that the rationale urged by Respondent Washington Education Association (the "WEA") and adopted by the Washington Supreme Court below undermines steps the State of Washington has taken to ensure that such workers are not forced to support political activities to which they object. The WEA seeks a new "right" to have unions obtain, by the most convenient means possible, the fees of nonmembers for use in political activities. To give birth to this right, the union radically misinterprets decisions of this Court concerning the use of agency shop fees and the right of individuals to be free from government compulsion to associate with a political viewpoint that they reject. The touchstone in this Court's decisions regarding agency shops has been a concern for protecting the *nonmember,* not the union. In contrast to the union's arguments and the Washington Supreme Court's conclusion, this Court has never recognized that a union possesses any right at all in having the government be its political fundraiser and collection agency. Indeed, the Washington statute at issue here does not implicate, much less violate, any right possessed by the union.

Additionally, the Institute will demonstrate that the position of the WEA is inconsistent with the right of individuals to keep their political beliefs private, especially in the face of possible coercion and retaliation. A procedure under which a nonmember has the burden to object to the union's use of her fees for political purposes requires the nonmember to identify herself to that same union as a person who does not affirmatively support and likely disagrees with the union's political activity. This violates the nonmember's right to refuse to announce or express her political views. The procedure created by the State of Washington, on the other hand, does not require nonmembers to announce to the union that they do not support its political agenda; instead, the nonmember may simply not respond to the union's request for permission. Under such an "opt-in" procedure, it is unclear to the union and others whether the nonmember opposes, supports, or is disinterested in the union's political activities, or whether the nonmember simply does not want to take the time to fill out the permission form. Washington's procedure thus preserves at least some aspect of the nonmember's right to keep her political views private.

Finally, the Institute will demonstrate that the Washington Supreme Court's reliance on a statement from this Court that "dissent is not to be presumed" is neither constitutionally nor logically required. It is, instead, simply a description of a statutory structure dissimilar to the statutory protections for nonmembers adopted by Washington State.

ARGUMENT

I. PROVIDING ASSOCIATIONAL PROTECTIONS TO NONMEMBERS DOES NOT VIOLATE OR EVEN IMPLICATE A UNION'S FIRST AMENDMENT RIGHTS

In *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), this Court spelled out one of the most fundamental tenets of First Amendment jurisprudence: individuals, including public employees, cannot be compelled to fund speech with which they disagree. As *Abood* made clear, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234-35. To ensure that this fundamental First Amendment protection is preserved for local government employees who are required, by law, to fund union collective bargaining activities, the people of Washington adopted a modest, commonsense requirement: before a union may use a nonmember's money to finance union political activity, the union must obtain the nonmember's affirmative consent.

The WEA seeks to dismantle this commonsense protection in order to ensure that it retains the ability to spend nonmember funds – money to which it is not constitutionally entitled – on the political causes of its choice. In a perverse distortion of this Court's many cases affirming the inviolability of a nonmember's right not to subsidize union political speech with which she disagrees, the WEA maintains that *it* has a First Amendment right to forcibly collect nonmember funds and spend them on political activity *without the nonmember's affirmative consent.* In other words, the union's position is that the First Amendment creates a right for the union to use someone else's

money to further a political agenda with which the owner of the money may disagree unless and until that person goes through certain administrative procedures to stop it. This imagined right flatly contravenes *Abood*'s holding that the First Amendment prohibits "requiring [an employee] to contribute to the support of an ideological cause he may oppose." *Id.* at 235.

The radical position urged by the union and adopted by the Washington Supreme Court grants to unions rights far beyond those possessed by other Americans. To be sure, both the union and the nonmember have a constitutional right to not have the government silence their speech, particularly on the basis of its content or subject matter. *See Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Likewise, both parties have a constitutional right to not have the government compel them to speak. *See W. Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 634 (1943) (First Amendment does not permit authorities to compel a person to utter a message with which he does not agree). As is discussed above, both parties also have a right to not fund private speech with which they disagree. *See Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 558 (2005) (discussing cases holding that individuals have the right to refuse exactions that fund speech by private entities).

To this panoply of rights, the Washington Supreme Court and the WEA have added one more, which applies only to unions in states with union security clauses and to no other American: unions have the right to obtain, in the most convenient way possible, money from people who are not members in order to fund the union's political speech.

App. 19a. The court below was unable to point to any case law, from this Court or any other, in which such a right is acknowledged, much less used to strike down a properly enacted law. The union has likewise been unable to point to any decision holding that it is a violation of a union's rights to force a union to *ask permission* before it uses someone else's property for its own means.[2] This is because there is no such right. To concoct this "right," the court and the union fundamentally misinterpret this Court's precedent, a short review of which demonstrates that this Court has never suggested, much less recognized, such a right. In other words, the Washington law at issue here is not unconstitutional because it does not implicate – much less violate – any rights the union possesses under the First Amendment. Thus, any governmental conditions on the union's collection of fees from people who do not wish to associate with it are both fair and constitutional.

A. Section 760 And Agency Shop Agreements

Washington law creates a system for union representation of local government employees in which a union and a local government employer may agree to an arrangement in which every employee represented by a union must pay, as a condition of employment, a service fee equal to the

---

[2] Outside of the labor law context, using another person's money without that person's express permission is known as "misappropriation" and is generally considered unlawful or at least unethical. *See In re Harrison*, 461 A.2d 1034, 1036 (D.C. App. 1983) ("misappropriation" consists of any unauthorized use of funds, including not just stealing but also unauthorized temporary use, for one's own purpose). Essentially, the Washington Supreme Court elevated what is typically a crime and grounds for disbarment – using someone else's money without their express permission – to the level of a constitutional right.

amount of union dues. Wash. Rev. Code § 28B.52.045(2), App. at 124a; Wash. Rev. Code § 41.56.122(1), App. at 129a; Wash. Rev. Code § 41.59.100, App. at 131a. This arrangement, known as an "agency shop" agreement, requires fee payment by every local government employee of any local government that has entered into such an agreement, regardless of whether the employee is a member of the union or not. *See Abood,* 431 U.S. at 211. Through a series of decisions dating back fifty years, this Court has made clear that, if the nonmember objects, a union may not use a nonmember's fees collected pursuant to an agency shop agreement for matters unrelated to collective bargaining. *Ry. Employees' Dept. v. Hanson,* 351 U.S. 225, 235 (1956); *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 768-69 (1961); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen,* 373 U.S. 113, 118 (1963); *Abood,* 431 U.S. at 234; *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees,* 466 U.S. 435, 448 (1984); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson,* 475 U.S. 292, 303 (1986); *Commc'ns Workers of Am. v. Beck,* 487 U.S. 735, 762-63 (1988); *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 519-22 (1991). Among the activities that do not fall within the "collective bargaining" umbrella is a union's use of such fees to promote its political agenda. *Abood,* 431 U.S. at 234.

The Washington law at issue here provides additional protections to nonmembers on top of the constitutional protections recognized in the case law cited above. Under the Washington law, a union may not use a nonmember's fees for political purposes unless the nonmember gives the union affirmative authorization for it to do so. Wash. Rev. Code § 42.17.760 ("Section 760"). In other words, Section 760 mandates that a union may only use a nonmember's

fees for political purposes if the nonmember "opts-in" to the union's political program.

B. The Washington Supreme Court's Decision Misinterpreted This Court's Holdings

The Washington Supreme Court, however, relying on *Street, Abood, Hudson, Allen,* and *Ellis,* held that the "opt-in" system in Section 760 violates the First Amendment rights of the union. App. at 19a. It held that these cases mandate a procedure by which the *nonmembers* must affirmatively state that they do not wish the union to use their fees for political purposes – that is, that a nonmember *must* "opt-out." *Id.* The court's decision badly misconstrued this Court's holdings in these cases. None of these cases concerned a First Amendment right of unions to have the government construct a system under which individuals are forced to associate with the union and have the government withhold a nonmembers' funds for the union's political use, regardless of the procedure used. Indeed, absent other sections of Washington law, the unions have no right to expect this governmentally mandated relationship to exist in the first place. *See* App. at 36a (Sanders, J., dissenting) ("Should the legislature of the State of Washington choose to repeal the mandatory withholding provisions of RCW 41.59.060 and .100, there would be no constitutional impediment to doing so. And no party to this proceeding claims there is."). Instead of focusing on any constitutional right the union allegedly possesses to have the government appoint it a collective bargaining unit and withhold funds on its behalf, these cases focus entirely on minimizing the harm the agency shop agreements have on *nonmembers* who are compelled to pay agency fees to the union as a condition of employment.

The harm this Court sought to alleviate in each of these cases, of course, is the impact agency shop agreements have on the rights of nonmembers to not associate with the union and not be forced to financially support a political agenda with which they disagree. These are both key First Amendment concerns. *See Abood,* 431 U.S. at 234-35 ("For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."). In that regard, this Court has been clear that the payment of agency fees in and of itself "'has an impact upon [nonmembers'] First Amendment interests.'" *Lehnert,* 500 U.S. at 516 (quoting *Abood,* 431 U.S. at 222). As this Court has stated:

> Unions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns.

Lehnert, 500 U.S. at 516. Thus, the agency shop agreement, especially in the public sector, raises considerable First Amendment issues by requiring an employee to contribute funds to an organization to which he does not wish to belong.

Under this Court's precedents, however, these concerns may be overcome by two governmental goals that justify any burdens on a nonmember's First Amendment rights: the desirability of labor peace and eliminating the problem of "free riders" who benefit from the union's collective bargaining activities but do not financially

shoulder the cost. *Id.* at 517. This Court has identified *only* these two interests as being sufficiently compelling to justify the impact on the nonmember's freedom to not associate with the union. In none of these cases has this Court held that the union has a First Amendment right to use the government's creation of a collective bargaining unit as a short cut for raising funds for political purposes.

C. Section 760 Does Not Implicate Any Constitutional Rights Possessed By the Union And No First Amendment Scrutiny Is Necessary

To be sure, a union may constitutionally spend funds for the expression of political views, to promote candidates, or to engage in other ideological activities not germane to the union's duties as a collective-bargaining representative. *Abood,* 431 U.S. at 235-36. But Section 760 impacts none of these activities. Under Section 760, the union may still engage in all of them. *See Street*, 367 U.S. at 770 ("Our construction therefore involves no curtailment of the traditional political activities of the railroad unions. It means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money."). What Washington requires, however, is that the union get permission from the people who are forced to pay fees as a condition of their employment before it uses this money for political purposes.

Nonetheless, the Washington Supreme Court held that an "opt-in" procedure violates the union's First Amendment rights because of the "obvious, significant expense involved in complying with" Section 760. App. at 19a. The court accepted the WEA's argument that Section 760 creates an insurmountable hurdle to their political

advocacy. App. at 19a. However, Section 760 creates no burden for the union at all. The activities both the union and the Washington Supreme Court describe as unduly burdensome consist of identifying individuals who may contribute to the union's political activities, contacting them, persuading them of the attributes of the union's political goals, and requesting that they grant their consent to the use of their funds for these purposes. This is what every other political organization in the United States, from the Sierra Club to the National Rifle Association to the Socialist Workers Party, must do in order to get people to contribute funds. Contacting a discrete subset of known individuals (*i.e.*, employees of local governments in Washington who are not members of the union) and trying to persuade them to grant permission to withhold additional fees for political purposes is not an undue burden on the union – if anything, Washington's agency shop law makes the union's task easier than most. The union has no right – and should not have any expectation – to have the government construct a procedure that permits the union to obtain money from people who do not wish to associate with it *and* that this procedure be as easy for the union to use as possible. Despite the conclusion of the Washington Supreme Court, the government is not constitutionally mandated to construct a short cut for unions to raise political funds.

Under Section 760, unions may still contribute funds, purchase advertising, mail letters, and engage in other forms of political advocacy. They simply must do this with money that has been voluntarily and affirmatively contributed for that purpose. Because Section 760 does not implicate the union's right to engage in political advocacy, this Court need not apply the "strict scrutiny" standard to

the statute. Rather, as a general law regulating labor relations, Section 760 is not subject to First Amendment scrutiny at all. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring) (because state indecency statute did not regulate speech, it should not be subject to First Amendment scrutiny). To be sure, if Section 760 did regulate the union's ability to engage in political advocacy, it would be subject to the highest standard of justification and rightly so. *See id.* at 578 (Scalia, J., concurring) (when a statute regulates expression, strict scrutiny applies; when it does not, that is the end of the inquiry). But because Section 760 simply requires that the union seek permission before it uses other people's money for its own purposes, it does not affect the union's ability to engage in political advocacy. Indeed, without other sections of Washington law creating agency shops, the union would have no claim to or interest in this money at all. Thus, this Court's inquiry should begin – and end – with the acknowledgment that Section 760 does not implicate any free speech rights possessed by the union.

II. SECTION 760 PROTECTS THE RIGHTS OF NONMEMBERS TO REFUSE TO ANNOUNCE THEIR POLITICAL VIEWS

The Washington Supreme Court below held that the Constitution mandates an "opt-out" procedure for dissenting nonmembers and that a "presumption of dissent" violates the First Amendment rights of both the union and nonmembers. App. at 20a. This conclusion is contrary to this Court's decisions holding that an individual has a right to refrain from announcing her political beliefs,

especially when that act may result in ostracism, coercion, threats or worse.

"The Constitution protects against the compelled disclosure of political associations and beliefs. Such disclosures 'can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)). In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), this Court recognized the "vital relationship between freedom to associate and privacy in one's associations." This Court made clear that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* As Professor Tribe has explained:

> [A]nonymity has long been recognized as absolutely essential for the survival of dissident movements; the glare of public disclosure, so healthy in other settings, may operate in the context of protected but unpopular groups or beliefs as a clarion call to ostracism or worse. Thus the Court has had little difficulty in recognizing . . . that "compelled disclosure . . . may constitute a restraint of freedom of association."

Laurence H. Tribe, *American Constitutional Law* § 12-26 at 1019 (2d ed. 1988) (omission in original; footnotes omitted; quoting *NAACP*, 357 U.S. at 462). These concerns apply here.

An "opt-out" program requires the nonmember to publicly identify herself to the union as a person who, at the least, does not support the union's political goals enough to pay to further them, and, at the most, actively

opposes them. It requires the nonmember to inform her co-workers, her bosses, her subordinates, her employer, and the labor organization representing her in collective bargaining that her political views are not aligned with the union. It compels her to announce a political position that she may desire to keep private. It also identifies the objecting nonmember as a troublemaker and opens her to coercion, threats, or other forms of pressure to support the union's objectives.

Unfortunately, this is not an idle concern and coercion is not something that occurred solely in the distant past. As testimony offered before a Congressional committee in 1997 demonstrates, coercion still plays a part in some union interactions with nonmembers:

> Several workers appearing before the Committee testified as to the coercion and intimidation they experienced once they began to question the orthodoxy of full union membership and dues payment. Again, Kerry Gipe told the Committee: '. . . the union began an almost immediate smear campaign against us, led by our Local President . . . portraying us as scabs, and freeloaders. . . . We had our names posted repeatedly on both union property and company property accusing us of being scabs. We were thrown out of our local union hall, and threatened with physical violence. . . . We were accosted at work, we were accosted on the street. We were harassed, intimidated, and threatened. We were told that our names were being circulated among all union officials in order to prevent us from ever being hired into any other union shop at any other location. The union membership was told that we were refusing to pay any union dues which

> created a very hostile environment among our fellow workers.'
>
> James Cecil of Clarkston, Michigan, testified that 'the union agent wanted to know why I would not sign the check-off and join . . . he became angry and asked me who the hell I thought I was? Did I think I was some kind of intellectual? Did I think I was better than the other workers out there? I told him no, but I know what my rights are and I intend to defend them. . . . He promised me in no uncertain terms that he would bring the full force of his and the other unions down on me if I dared to do that . . . I was greatly concerned about retaining my job and for my physical well-being.'

H.R. Rep. No. 105-397, at 8-9 (1997) (omissions in original; footnotes omitted). Similarly, a worker testified before a House Subcommittee regarding his experiences as a prominent union opponent:

> When the Culinary Union walked through the door they immediately began telling union followers whom they could talk to and whom they could not associate with. The union representatives had soon divided the workers into two groups, union and non-union, which they quickly labeled as 'anti-union'. This label was quickly followed by 'welfare recipients', 'freeloaders' and of course 'liars', were a few of the many.
>
> . . . .
>
> Another gentleman came to me and apologized for signing the card because union representatives had told him, "We know where you live, we know where your kids go to school and

> we know where your wife works. If you do not sign that card, 'accidents' can happen."

Compulsory Union Dues and Corporate Campaigns: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and the Workforce, 107th Cong. 62-63 (2002).

For workers represented by unions such as these, choosing to fill out the "opt-out" form can act as a "clarion call" for such treatment. The nonmember who "opts-out" is doubly suspect – she both refuses to join the union and publicly refuses to financially support its political activity. The very real possibility of retaliation or coercion in such circumstances creates a powerful disincentive for the nonmember to express her fundamental First Amendment right to refuse to fund a political cause with which she does not agree. In addition to outright coercion, the nonmember may believe that publicly proclaiming herself as a troublemaker could have subtle, but considerable, impacts on her career prospects and economic livelihood. "In respect to all persons but those whose pecuniary circumstances make them independent of the good will of other people, opinion, on this subject, is as efficacious as law; men might well be imprisoned, as excluded from the means of earning their bread." John Stuart Mill, *On Liberty*, in *Mill: A Norton Critical Edition* 65 (1997). In such circumstances, "the pressure upon a teacher to avoid any ties which might displease those that control his professional destiny would be constant and heavy." *Shelton v. Tucker,* 364 U.S. 479, 486 (1960). In short, the "opt-out" system is ripe for the abuse of the nonmembers' associational and free speech rights.

In contrast, an "opt-in" procedure maintains a level of uncertainty about the political views of a nonmember who does not "opt-in." It gives the nonmember, like every other citizen, the option of being an enigma. *See* Aron Gregg, *The Constitutionality of Requiring Annual Renewal of Union Fee Objections in an Agency Shop,* 78 Tex. L. Rev. 1159, 1177 (2000) (under the "opt-out" system, a union objector must go to some lengths to refute the presumption that he supports the union's views). Does the nonmember actively oppose the union or is she simply disinterested in its political activities? Does the nonmember support the union's political activities but believe that her financial situation requires her to keep the money that would otherwise go to the union? Is the nonmember just disinterested in anything but her professional responsibilities? Does the nonmember support the union's political objectives but object to other expenditures unrelated to collective bargaining? While Washington's law does not completely preserve the dissenting nonmember's ability to keep her political views private, it does not require her to disclose the precise nature of her political beliefs to those around her.

While this Court has never addressed the constitutionality of an "opt-in" procedure, it is clear that requiring people to affirmatively "opt-out" of contributing agency fees to a union's political activities presents serious constitutional problems. Section 760 resolves these problems. It does so while preserving the right of the union to request financial support from nonmembers and engage in political advocacy. In short, Section 760 does not violate the Constitution – instead, it may be constitutionally *required.*

III. A CONCLUSION THAT "DISSENT IS NOT TO BE PRESUMED" IS NEITHER CONSTITUTIONALLY NOR LOGICALLY REQUIRED

Like the Washington Supreme Court, App. at 16a, the WEA may argue that this Court's statement in *Street* that "dissent is not to be presumed" means that this issue is settled. *See Street,* 367 U.S. at 774. This is wrong for several reasons.

First, in *Street*, this Court took great pains to decide the case solely on statutory grounds. *See id.* at 765-70. To be precise, *Street* at most recognized that "dissent is not to be presumed" *under the Railway Labor Act. See Abood*, 431 U.S. at 240 (noting that *Street* was "concerned with statutory rather than constitutional violations"); *id.* at 236 (noting that *Street* was resolved "as a matter of statutory construction"). After all, the Railway Labor Act did not contain a statutory "opt-in" requirement like that in Section 760, so it would have been inconsistent with congressional intent to presume nonmember dissent. That does *not* mean *Street*'s statement that "dissent is not to be presumed" is a declaration of constitutional principle or that it should be relied upon in the interpretation of statutory schemes dissimilar to the Railway Labor Act.[3]

---

[3] Arguably, *Street*'s statement that "dissent is not to be presumed" is not even an interpretation of the Railway Labor Act, but simply a *pleading* requirement for nonmembers seeking a *judicially* created and enforced remedy. *See Street*, 367 U.S. at 774 (stating, in discussion of appropriate judicial remedy, that "dissent is not to be presumed"); *Allen*, 373 U.S. at 118-19 (quoting *Street* in discussion of pleading and proof requirement for obtaining judicial remedy); *Abood*, 431 U.S. at 237-38 (quoting *Street* in discussion of appropriate judicial remedy).

In fact, this Court subsequently reviewed an agency shop arrangement that *did* presume nonmember dissent and the Court never questioned the constitutionality of such a practice. The teachers' union in *Hudson* charged nonmembers a "fair share fee" equal to 95 percent of regular union dues. *Hudson,* 475 U.S. at 294-95. That amount was calculated by reducing regular union dues by the amount the union conceded was spent on activity unrelated to collective bargaining, *i.e.*, political activity. *Id.* at 295. If an objector successfully used the union's objection procedure to challenge the calculation, the union prospectively reduced fees for *all* nonmembers, regardless of whether they actually objected. *Id.* at 296. Thus, the union *presumed* nonmember dissent and this Court expressed no concern about the constitutionality of that practice.

Indeed, it is illogical *not* to presume dissent with respect to nonmember employees. As the Seventh Circuit has made clear, "[t]wo distinct types of employee will decline to join the union." *Gilpin v. Am. Fed'n of State, County, and Mun. Employees, AFL-CIO,* 875 F.2d 1310, 1313 (7th Cir. 1989). "The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to." *Id.* In either case, the employee is opposed to funding the union's political agenda. A presumption of dissent from the union's use of his funds for political purposes is therefore eminently reasonable. In contrast, a presumption of acquiescence ascribes to the employee a level of agreement with union activity that common sense does not support.

Finally, to not presume nonmember dissent is to presume nonmember consent, which the First Amendment

will not tolerate. *Abood*, after all, held that "the Constitution *requires* ... that [union political] expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas." *Abood*, 431 U.S. at 235-36 (emphasis added). The only way to guarantee that this constitutional requirement is met – that is, the only way to guarantee that a union's political causes are financed solely "by employees who do not object to advancing those ideas" – is to affirmatively *obtain*, not presume, consent. *Id.* When consent is presumed, it is a virtual certainty that – because of the possibility of coercion, the fear of negative professional impacts, or simply a view that maintaining one's political principles is not worth the hassle of affirmatively objecting – union political activity will be financed in part by the compelled monies of persons politically or ideologically opposed to the activity. In other words, it is a virtual certainty that a constitutional violation will occur.

CONCLUSION

For the foregoing reasons, amicus curiae Institute for Justice respectfully requests that this Court reverse the decision of the Washington Supreme Court.

DATED: November 8, 2006

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
MICHAEL BINDAS
811 First Avenue, Suite 625
Seattle, Washington 98104
Telephone: (206) 341-9300
Facsimile: (206) 341-9311

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
901 North Glebe Road
Suite 900
Arlington, Virginia 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321

**Counsel of Record*

624E (1)

FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 05-1589 & 05-1657 (consolidated)

In The
Supreme Court of the United States

GARY DAVENPORT, ET AL.,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Writs Of Certiorari To The Supreme Court Of Washington

BRIEF OF AMICUS CURIAE MACKINAC CENTER FOR PUBLIC POLICY SUPPORTING PETITIONERS

PATRICK J. WRIGHT
Counsel of Record
MACKINAC CENTER FOR PUBLIC POLICY
140 S. Main St.
P.O. Box 568
Midland, Michigan 48640
Phone (989) 631-0900
Fax (989) 631-0964

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. Introduction	3
II. A union should be allowed to charge only those fees that are related to its statutory duties as the exclusive bargaining agent. This Court should create a prophylactic rule that would prevent government compulsion from being used to facilitate collection of fees unrelated to those duties. This rule would necessarily exclude the collection of agency fees related to political causes	5
III. The state is not obligated to use as much compulsion as is constitutionally permissible in order to allow the union to maximize the amount of money it can receive from nonmembers. The state, which does not have to grant a union exclusive bargaining power, may enact a statute that prevents nonmembers' fees from being used for political causes without their consent	22
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).....*passim*

Bhd. of Ry. and S.S. Clerks, Freight Handlers, Express and Station Employes v. Allen, 373 U.S. 113 (1963).....13, 14

Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986).....4, 16, 17

Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).....24, 25

Commc'n Workers of America v. Beck, 487 U.S. 735 (1988)..... 7, 8

Grutter v. Bollinger, 539 U.S. 306 (2003)..... 24

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)..... 20

Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961).....*passim*

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991).....2, 18, 19

Michigan State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997)..... 23

NLRB v. General Motors Corp., 373 U.S. 734 (1963)..... 21

Ry. Employes' Dep't v. Hanson, 351 U.S. 225 (1956) 9, 10, 17

Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979)..... 6

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)..... 20

Wooley v. Maynard, 430 U.S. 705 (1977)..... 20

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

U.S. Const. amend. I ..... *passim*

STATUTES

45 U.S.C. § 152 ..... *passim*

Wash. Rev. Code § 42.17.760 ..... *passim*

Wash. Rev. Code § 41.59.100 ..... 1, 4, 5, 20, 22

OTHER

Florence C. Thorne, Samuel Gompers – American Statesman 24 (Philosophical Library Inc. 1957) 7

Fr. Edward A. Keller, The Case for Right to Work Laws: A Defense of Voluntary Unionism 90 (The Heritage Foundation, Inc., 1956) 7

INTEREST OF AMICUS CURIAE[1]

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility and respect for private property. The Center is a 501(c)(3) organization founded in 1988.

Compulsory unionism increases the costs of education and decreases the money available for education items not related to personnel. It discourages the treatment of teachers as professionals and discourages qualified individuals from becoming teachers. Compulsory unionism also increases the politicization of public schools through the adversarial nature of union bargaining.

SUMMARY OF ARGUMENT

The State of Washington allows unions to be the exclusive bargaining agent for all educational employees who work in a bargaining unit. The Washington Education Association is the union involved in the instant cases. The state allows a certified education union to bargain for a union security clause that allows the union to collect an agency fee from educational employees who are in the bargaining unit but do not want to join the union. Wash. Rev. Code § 41.59.100. This type of agreement is known as

[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part, nor did any person or entity, other than amicus curiae, its members or its counsel make a monetary contribution to the preparation or submission of this brief.

an agency shop agreement, and this Court has indicated that it might be the most restrictive form of compulsory unionism that still meets constitutional muster.

In a long line of cases, starting with *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), this Court has recognized that employees who do not want to join the union do not have to provide financial support for the union's political activities. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), it was recognized that the nonmember's right was based on the First Amendment.

The next logical step in this Court's jurisprudence is a recognition that there is no obligation on a nonmember to dissent before First Amendment protections can be invoked. A dissent requirement is improper, since it takes away a nonmember's right to silence, and since it is not narrowly tailored to advance the government's interests in promoting labor peace and in fairly apportioning the costs related to collective bargaining.

In his partial dissent and concurrence in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), Justice Scalia stated that only those fees related to the statutory duties imposed on the union could be charged to nonmembers. This Court should adopt this standard, which respects nonmembers' individual rights and precludes the possibility that a nonmember could be charged for political expenditures with which he or she does not agree.

But even if this Court does not adopt this standard, it should reverse the Washington Supreme Court's ruling. The statute that the Washington Supreme Court addressed was not the statute allowing for an agency fee; rather, it was Wash. Rev. Code § 42.17.760, which requires

a teachers union to obtain affirmative authorization from a nonmember before using that nonmember's fee for expenditures related to political causes. The Washington Supreme Court held that this affirmative authorization requirement was unconstitutional.

This Court should hold that § 42.17.760 is firmly within the state's constitutional powers. After all, the State of Washington is not constitutionally required to enact a statute that allows a fee to be charged to a nonmember; the state is not even required to allow a teachers union to become an exclusive bargaining agent in the first place. Given that Washington has the ability to eliminate collective bargaining and agency fees altogether, the state most certainly can enact a statute that allows such fee payments only under certain conditions.

ARGUMENT

I. Introduction

The State of Washington allows a union to become the exclusive bargaining agent for education employees. A permissible item in a contract between the education employees and the employer is an agency shop requirement:

> A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop. If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues.

Wash. Rev. Code § 41.59.100. As part of Initiative 134, Washington's voters enacted Wash. Rev. Code § 42.17.760, which states "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual."

The WEA admitted that it violated § 42.17.760, which led to two lawsuits. In the first, *Washington v. WEA*, No. 05-1657, the state filed an action against WEA seeking civil penalties. In the second, *Davenport v. WEA*, No. 05-1589, individual teachers who were not union members claimed that the violation of § 42.17.760 provided them a private cause of action against the union.

The Washington Supreme Court asked three questions: (1) Does the WEA's *Hudson* process[2] satisfy Wash. Rev. Code § 42.17.760? (2) Does the requirement of affirmative authorization render Wash. Rev. Code § 42.17.760 unconstitutional? and (3) Does chapter 42.17 of the Washington Revised Code create a private cause of action? The court answered "no" to the first question and "yes" to the second. The answer to the second question obviated any need to answer the third.

Both the Davenport petitioners and the Washington petitioner contend that Washington's opt-in statute is constitutional – i.e., that the Washington Supreme Court answered its second question incorrectly. But the Davenport petitioners also present the more fundamental question of

---

[2] The *Hudson* process refers to minimal procedures required before a union may spend the full amount of a nonmember's agency fee. *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986). This process is discussed below.

whether unions *ever* have a right to collect fees intended for political use from nonmembers. Amicus curiae will address this broader question first.

II. A union should be allowed to charge only those fees that are related to its statutory duties as the exclusive bargaining agent. This Court should create a prophylactic rule that would prevent government compulsion from being used to facilitate collection of fees unrelated to those duties. This rule would necessarily exclude the collection of agency fees related to political causes.

A nonmember's First Amendment speech rights include two "negative" rights: the right not to be compelled to speak, and the right not to be compelled to support political causes to which he or she is opposed. The state's interest in labor peace and its lesser interest in fairly apportioning the costs related to labor peace between union members and nonmembers is insufficient to overcome a nonmember's First Amendment speech rights.

In order to protect the right to silence, it must be presumed that the nonmember objects to the use of his or her money for political purposes. In the absence of such a presumption, nonmembers must forfeit their right to silence and express their objection, or they will lose their right to withhold their wages from the support of political activities with which they may disagree. The coercive power of the state should be used only to allocate fees related to duties that the union has been assigned by statute. Fees related to political causes are not part of a union's statutory duties; therefore, such fees could not be charged to nonmembers. Thus, Wash. Rev. Code § 41.59.100 should be held unconstitutional to the extent

that it allows a union to deduct fees unrelated to the union's statutory duties from a nonmember's paycheck.

A basic concept of labor law in the public employer context is that individual members of society have an associational right to join a union, but there is no constitutional obligation for a government to recognize the union and to bargain with it. In *Smith v Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), a union challenged a state practice whereby a disgruntled employee had to submit a written complaint directly to a government representative rather than to the union. This Court held there was no violation of the First Amendment:

> The First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective." The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.
>
> . . .
>
> . . . Far from taking steps to prohibit or discourage union membership or association, all the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do.

Id. at 465-66 (citations omitted).

There is no requirement that a union be an exclusive bargaining agent; it is a choice that a government can

make, not one that it is compelled to make.[3] One example of a compulsory union statute is the National Labor Relations Act (NLRA or Wagner Act), which was passed in 1935 and made the union the exclusive bargaining agent for all employees within its bargaining unit.

At first, the Wagner Act allowed the unions to negotiate for "closed shops," which meant that only those workers who were already union members could be hired. *Communication Workers of America v. Beck*, 487 U.S. 735, 747 (1988). But in passing the 1947 Taft-Hartley Act, Congress determined that the closed-shop arrangement

---

[3] Some labor leaders believed that voluntary unionism as opposed to compulsive unionism was the better policy course. In 1881, Samuel Gompers helped found the American Federation of Labor (from 1881 until 1886, the AFL was known as the Federation of Organized Trades and Labor Union). Except in 1895, Gompers was the president of the AFL from its inception, when it had thousands of members, until his death in 1924, when it had millions. Samuel Gompers believed in voluntarism:

> There may be here and there a worker who for certain reasons unexplainable to us does not join a union of labor. That is his right no matter how morally wrong he may be. It is his legal right and no one can or dare question his exercise of that legal right.

Florence C. Thorne, Samuel Gompers – American Statesman 24 (Philosophical Library Inc. 1957). He also stated:

> I want to urge devotion to the fundamental of human liberty – to the principles of voluntarism. No lasting gain has ever come from compulsion . . . the workers of America adhere to voluntary institutions in preference to compulsory systems which are held to be not only impractical, but a menace to their rights, their welfare and their liberty.

Quoted by Fr. Edward A. Keller, The Case for Right to Work Laws: A Defense of Voluntary Unionism 90 (The Heritage Foundation, Inc., 1956).

was abusive and that it "create[d] too great a barrier to free employment to be longer tolerated." *Id.* at 748 (citation omitted). Therefore, Congress amended the NLRA to allow – though not require – agreements whereby an employee had to become a "member" within a certain time frame. *Id.* at 749. This type of agreement is known as a union-shop agreement.[4]

But the formal union-shop agreement described above merely exists in theory at this time. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), this Court indicated that, under federal law, the payment of the necessary fee is all that is needed to satisfy the membership requirement and thereby prevent the enforcement of a union security agreement:[5]

> Under a union-shop agreement, an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required. Under both the National Labor Relations Act and the Railway Labor Act, "(i)t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues." [*NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963)]. See 29 U.S.C. § 158(a)(3); 45 U.S.C. § 152 Eleventh. . . . Hence, although a

---

[4] Another federal law, the Railway Labor Act, allows a union to act as the exclusive bargaining agent for the bargaining unit. It also allows for a union shop agreement.

[5] The security agreement allows for the union to ask that an employee not in compliance with the security agreement's requirements, in this case payment of an agency fee, be fired.

> union shop denies an employee the option of not formally becoming a union member, under federal law it is the "practical equivalent" of an agency shop, [*NLRB v. General Motors Corp.*, supra, at 743]. See also [*Lathrop v. Donohue*, 367 U.S. 820, 828 (1961)].

Abood, 431 U.S. at 217 n. 10.

In *Abood*, this Court noted that a strict requirement that "each employee formally join the union" could be unconstitutional. *Id.* This Court did not explicitly mention the theory on which this claim would rest, but given the context, it seems likely that the Court meant that such a requirement might infringe on a nonmember's freedom of association – in this case, the right not to associate with the union. Thus both the formal union shop and the stricter closed shop are of dubious constitutionality, and it may be that an agency shop is the strictest form of compulsory unionism that passes constitutional muster.

This Court began examining the free-speech rights of employees who have not joined a union in *Ry. Employes' Dep't v. Hanson*, 351 U.S. 225 (1956). In that case, the plaintiffs were "not members of the defendant labor organizations and desire[d] not to join." *Id.* at 227. The plaintiffs, Nebraska residents, challenged § 2, Eleventh of the Railway Labor Act (RLA), 45 U.S.C. § 152, which permitted union-shop agreements to be entered into by a union and an employer, and plaintiffs claimed that § 2, Eleventh violated the Nebraska Constitution's right-to-work provision. The Nebraska Supreme Court had held that "the union shop agreement violates the First Amendment in that it deprives the employees of their freedom of association and violates the Fifth Amendment in that it requires the members to pay for many things besides the cost of collective bargaining." *Id.* at

230. This Court noted that while there were strong policy considerations against allowing union-shop agreements, the matter was for Congress to decide. *Id.* at 233-34. In regard to free speech, this Court held that the union could seek fees, but left open the question of which fees would be proper. *Id.* at 238.

The first case from this Court that squarely addressed that question was *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). In *Street*, the plaintiffs were six railroad union members who claimed that § 2, Eleventh of the RLA was unconstitutional to the extent that the provision allowed a union to charge its members for fees that would be used to support political candidates.

The five-member majority construed § 2, Eleventh so as to avoid any constitutional controversy.[6] It noted that a union that is the exclusive bargaining unit also has the duty to represent fairly all employees within the bargaining unit regardless of whether those employees were members of the union. The majority held that the statutory history of § 2, Eleventh indicated that Congress merely meant to have each employee pay his or her share for certain union functions, not to force an employee to support political causes he or she opposed:

> § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes [but was not meant] to provide the

[6] Justice Douglas believed that § 2, Eleventh violated the First Amendment to the extent that an employee protested against the use of his or her money for political causes, but he joined the majority so that there would be an opinion that garnered five votes.

> unions with a means for forcing employees, over their objection, to support political causes which they oppose.

Id. at 764 (footnote omitted). But, in order for this protection to apply, the employee was required to object to the use of his or her money for political causes:

> Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. The safeguards of § 2, Eleventh were added for the protection of dissenters' interest, *but dissent is not to be presumed* – it must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.

Id. at 774 (emphasis added).

Justice Black recognized that the government's decision to use compulsory unionism is what triggers the First Amendment speech issues:

> Probably no one would suggest that Congress could, without violating this Amendment, pass a law taxing workers, or any persons for that matter . . . , to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes. Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by

> law to speak for a candidate, a party, or a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.
>
> There is, of course, no constitutional reason why a union or other private group may not spend its funds for political or ideological causes if its members voluntarily join it and can voluntarily get out of it. Labor unions made up of voluntary members free to get in or out of the unions when they please have played important and useful roles in politics and economic affairs. How to spend its money is a question for each voluntary group to decide for itself in the absence of some valid law forbidding activities for which the money is spent. But a different situation arises when a federal law steps in and authorizes such a group to carry on activities at the expense of persons who do not choose to be members of the group as well as those who do. Such a law, even though validly passed by Congress, cannot be used in a way that abridges the specifically defined freedoms of the First Amendment.

Id. at 788-89 (Black, J., dissenting) (footnotes omitted). He noted that the Government lacks the power to compel an individual to support political causes, and he would have limited the fees that can be collected with the assistance of government to those fees related to collective bargaining:

> In my view, § 2, Eleventh can constitutionally authorize no more than to make a worker pay dues to a union for the sole purpose of defraying the cost of acting as his bargaining agent. Our Government has no more power to compel individuals to support union programs or union

> publications than it has to compel the support of political programs, employer programs or church programs. And the First Amendment, fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other.

Id. at 791.

But Justice Black would not have approved an injunction to prevent the union from taking political money on a classwide basis. Instead, he too would have limited relief to the six plaintiffs who made their objection known. He believed that class relief was not possible since it was not possible to know which, if any, employees objected until they actually did so. He stated, "Other employees who have not protested are of course in the entirely different position of voluntary or acquiescing dues payers, which they have every right to be, and since they have asked for no relief this decree should not affect them." *Id.* at 794-95.

In *Bhd. of Ry. and S.S. Clerks, Freight Handlers, Express and Station Employes v. Allen*, 373 U.S. 113 (1963), two plaintiffs, who had not joined the union at the time they initiated their suit, alleged that they should not have to pay fees that could be used to support political causes to which they were opposed. The trial court had entered an injunction prohibiting the union from collecting any money from the plaintiffs unless and until the union could show that the money taken would be related to collective bargaining.

This Court, again basing its decision on the RLA, rather than the First Amendment, held that an employee

had a duty to object and that classwide relief was improper. But this Court also clarified that an employee does not have an obligation to identify each union political expenditure with which he or she disagrees: "It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to any political expenditures by the union." *Id.* at 118.

The injunction entered into by the trial court was improper since it might have interfered with the functions and duties assigned to the union under the RLA. *Id.* at 120. This Court held that where there was a factual dispute about the proportion of fees or dues being used for political purposes, the union had the burden of proving that the expenditure was not political.

Street and *Allen* were statutory decisions. In *Abood*, this Court considered the question of agency shops in the context of government employment. Some Detroit teachers contended that agency shops were never proper in the public employment context, and that, even if agency shops were proper, the nonmember's agency fees were improperly being used to support political causes. This Court held that public employment agency shops were permissible. But in regard to free speech, this Court held "To compel employees financially to support their collective bargaining representative has an impact on their First Amendment interests." *Abood*, 431 U.S. at 222.

Abood addressed an issue that was not decided in *Street* or *Allen*: whether a union is entitled to collect fees for purposes other than collective bargaining. *Abood*, 431 U.S. at 232. This Court held that a union could spend funds on activities not related to collective bargaining, but

that it did not have the right to compel nonmembers to support these expenditures:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235-36 (footnote omitted). But the *Abood* majority accepted the claim that dissent by a nonmember is not to be presumed.

Writing for himself and two others, Justice Powell dissented. He correctly noted that the burden should be on the state to show that any fee that the state compels is in fact necessary to serve an overriding state interest:

> Before today it had been well established that when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests. See [*Elrod v. Burns*, 427 U.S. 347, 363 (1976); *Healy v. James*, 408 U.S. 169, 184 (1972); *Speiser v. Randall*, 357 U.S. 513, 525-26, (1958)]. The Court, for the first time in a First Amendment case, simply reverses this principle. Under today's decision, a nonunion employee who would vindicate his First Amendment rights apparently must initiate a proceeding to prove that the union has allocated some portion of its budget to "ideological activities

> unrelated to collective bargaining." I would adhere to established First Amendment principles and require the State to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives. This placement of the burden of litigation, not the Court's, gives appropriate protection to First Amendment rights without sacrificing ends of government that may be deemed important.

Id. at 263-64 (Powell, J., dissenting).

In *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), this Court discussed the constitutionality of a process in which an objecting nonmember could recoup a portion of his or her fee that had been collected by a union and used to advance the union's political causes. While this Court recognized that infringements on an individual's First Amendment rights should be narrowly tailored and subject to strict scrutiny, this Court held that a nonmember has the burden of objecting to the improper use of his or her fees.

The collection of agency fees was recognized to infringe on both a nonmember's First Amendment associational rights and his or her First Amendment free-speech rights. *Id.* at 302 n. 9. Any procedure that impinges on First Amendment rights must be narrowly tailored:

> [A]lthough the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its *limited infringement* on nonunion employees' constitutional rights, the fact that those rights are protected by the First

> Amendment requires that the procedure be carefully tailored to minimize the infringement.

Id. at 302-03 (footnote omitted and emphasis added).

This Court later noted that where a government has created an agency shop, both the union and the government must protect the nonmember's rights: "Since the agency shop itself is 'a *significant* impingement on First Amendment rights,' [*Ellis*, 466 U.S. at 455], the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n. 20 (emphasis added).[7]

This Court set forth the minimal constitutional requirements a union must satisfy before collecting an agency fee from nonmembers:

> We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Id. at 310.

---

[7] Thus, in the span of five pages, this Court indicated that an agency shop causes a "limited infringement" on nonmembers' First Amendment rights and a "significant impingement" on nonmembers' First Amendment rights. The 50 years of litigation that began with *Hanson* and continues in the instant cases is evidence that the latter term is more accurate.

In *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), this Court discussed whether certain union expenses could be charged to nonmembers. In a splintered decision, this Court held that charges like lobbying related to contract ratification or implementation could be assessed on both members and nonmembers, but that other lobbying charges could not be assessed on nonmembers. Similarly, this Court ruled that nonmembers could be charged that portion of fees that were passed on to the state or national union and related to collective bargaining, but could not be charged for litigation that was unrelated to the local bargaining unit.

Writing for himself and three others, Justice Scalia indicated that only those charges that relate to a union's statutory duties could be charged to nonmembers. *Id.* at 552 (Scalia, J., concurring in part and dissenting in part). The state's interest in eliminating "free riders" is limited to those duties it imposed on the union. *Id.* Justice Scalia explained:

> Once it is understood that the source of the state's power, despite the First Amendment, to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership, the constitutional limits on that power naturally follow. It does not go beyond the expenses incurred in discharge of the union's "great responsibilities" in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances," [*Abood*, 431 U.S. at 221]; the cost of performing the union's "statutory functions," [*Ellis*, 466 U.S. at 447]; the expenses "necessary to 'performing the duties of

> an exclusive representative,'" [*Beck*, supra, 487 U.S. at 762]. In making its other disbursements the union can, like any other economic actor, seek to eliminate inequity by either eliminating the benefit or demanding payment in exchange for not doing so. In a public relations campaign, for example, it can, if nonmembers refuse to contribute, limit the focus of publicity to union members, or even direct negative publicity against nonmembers, or terminate the campaign entirely. There is no reason – and certainly no compelling reason sufficient to survive First Amendment scrutiny – for the state to interfere in the private ordering of these arrangements, for the state itself has not distorted them by compelling the union to perform.

Id. at 556-57. He suggested the following test:

> I would hold that to be constitutional a charge must at least be incurred in performance of the union's statutory duties. I would make explicit what has been implicit in our cases since *Street*: A union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged.

Id. at 558.

Justice Scalia's formulation recognizes the reason that a nonmember's First Amendment rights are at issue: The state has allowed unions to charge workers for the costs of collective bargaining and to act as exclusive bargaining representatives, on the condition that the unions fairly represent union members and fee payers alike. In *Lehnert*,

as here, the state made the policy choice that it wanted the nonmembers to pay a fee equal to the union dues.

But a union is permitted to engage in activities that are not related to the union's statutory duties. Agency fee statutes, like Wash. Rev. Code § 41.59.100, allow too many fees to be charged to nonmembers.

Justice Scalia's formulation would rid this Court of the right-to-silence problem created by the *Street* court's suggestion that dissent should not be presumed. Elsewhere, this Court has recognized an individual's right not to be compelled to speak. *West Virginia State Bd. of Educ. v Barnette*, 319 U.S. 624 (1943) (holding that schoolchildren were not obligated to stand and recite the Pledge of Allegiance); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a resident of the state of New Hampshire could obtain a license plate that did not include the state's motto of "Live Free or Die"); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985) ("The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in the affirmative aspect.") (citation to quote omitted).

The *Street* ruling prevents silence from being an option. A nonmember is now required to actively voice dissent. As Justice Black noted in *Street*, in the absence of a state statute enacting compulsory unionism and requiring an agency fee to be paid, no one would seriously believe that the state could compel an individual to support a political cause he or she disagreed with. If that

individual were solicited, he or she would have the right both to reject the solicitation and to just ignore it. The requirement that a nonmember dissent takes away that right to silence.

It may be that the *Street* court did not consider the silence problem because it was concerned with a different issue – determining who wanted to be a member of the union and who did not. *Street* was a RLA case, and the RLA allows for union shops. *Street* was decided before *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); therefore, it was not clear that payment of the financial fees alone would be sufficient for membership. Thus, anyone who wanted to be employed had to join the union in all respects. By making a member dissent, this Court imprecisely was able to sort out those members who actually wanted to be in the union from those who did not. But since *NLRB v. General Motors Corp.* essentially reduced the union shop to an agency shop, there now exists an easy way to sort. Those who want to join the union do so, and those who do not want to join the union become fee payers. Therefore, there is no need for a requirement that a nonmember dissent before he or she is able to receive First Amendment protections.

By preventing a union from ever obtaining more fees than is necessary to meet its statutory duties, Justice Scalia's formulation would return the right of silence to the nonmember. A union is of course free to solicit political contributions from the nonmember, but the nonmember has the right to either say no or just ignore the solicitation. This puts the union in the same position as a political party, a charity or any other entity that may solicit the nonmember.

Traditional First Amendment jurisprudence requires that the state justify any infringement on the First Amendment. Further, infringements on First Amendment rights are supposed to be narrowly tailored. It is the state's decision to allow compulsory unionism that jeopardizes a nonmember's First Amendment rights. It is also the state's decision to require nonmembers to pay a fee equal to a union's dues. Neither interest is sufficient to require a nonmember to support a political cause that he or she does not agree with, or to cause the nonmember to lose the right to silence. Thus this Court should hold that Wash. Rev. Code § 41.59.100 is unconstitutional to the extent it allows for the collection of a fee unrelated to the WEA's statutory duties.

III. The state is not obligated to use as much compulsion as is constitutionally permissible in order to allow the union to maximize the amount of money it can receive from nonmembers. The state, which does not have to grant a union exclusive bargaining power, may enact a statute that prevents nonmembers' fees from being used for political causes without their consent.

The Washington Supreme Court held that Wash. Rev. Code § 42.17.760 was unconstitutional because it impinged upon the First Amendment rights of union members. It suggested that since this Court had held that dissent is not to be presumed, it is not permissible for a state to enact a statute requiring a nonmember to affirmatively authorize the use of his or her fees for political purposes. The Washington Supreme Court indicated that some nonmembers may not disagree with the political causes

the union supports. Further, the court ruled that § 42.17.760 imposes a significant administrative cost on the union.

The administrative burden argument was summarily rejected by the Sixth Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). In that case, the Sixth Circuit upheld an affirmative authorization requirement for members and nonmembers alike. The Sixth Circuit indicated that the administrative burden argument presented by the union was without merit:

> While plaintiffs and amicus curiae, the Michigan Education Association, suggest that the administrative burden of the annual consent provision will be crushing, they offer no support for that claim. An annual mailing to a union's contributing members, asking them to check a box and to return the notice to the union, would seem to suffice under the statute. Labor unions surely maintain some sort of records on their members already, and requiring the unions to make space in their files or databases for the inclusion of one more piece of information seems minimal, certainly a burden insufficient to rise to the level of a constitutional violation. Similarly, the suggestion that asking people to check a box once a year unduly interferes with the speech rights of those contributors borders on the frivolous.

Id. at 1253.

An interesting analogy can be drawn between Washington's Initiative 134 and Proposition 209, the 1996 California initiative that eliminated race and gender preferences. Both generally dealt with long-standing controversial issues. I-134, in part, concerned labor law, while Proposition 209, in part, concerned race relations. In

both labor law and race relations, the Supreme Court had held that a state had a sufficient interest to overcome an individual's constitutional rights. The quest for labor peace was a sufficient interest to justify collective bargaining, which impinges on an individual's First Amendment right not to associate with a union. Further, the requirement that a nonmember pay an agency fee makes some nonmembers support political causes that they disagree with, which impinges on their First Amendment free-speech and silence rights. This Court has held that a state's interest in "diversity" is sufficient to overcome an individual's right to equal treatment in the college admissions process. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Thus, in both instances there are state interests that can overcome core constitutional protections. But in both instances, there is no requirement that the state choose to enact those state interests. A state does not have to allow a union to become an exclusive bargaining agent, nor does it have to allow the union to negotiate a security agreement that requires nonmembers to pay an agency fee. In the race and gender context, there is no requirement that a university consider race and gender in college admissions. Just because a state acts on an interest that allows an impingement on an individual's constitutional rights, the state need not act on that interest to the full extent of its constitutional power.

In *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), the Ninth Circuit was faced with a constitutional challenge to Proposition 209. The plaintiffs, comprised of groups claiming to represent the interests of women and minorities, argued that the state had to come up with a compelling interest before it could prevent them

from receiving preferential treatment under the law. The Ninth Circuit rejected that argument:

> To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.

Id. at 709. Therefore, California citizens acted properly in enacting a constitutional amendment that prevented the use of a state interest – diversity – that the Supreme Court had approved of.

Here, Washington citizens did not entirely prevent the use of collection of an agency fee; rather, they put a condition on it. That condition is that the union must seek the affirmative authorization of a nonmember before collecting and using an agency fee for political purposes.

In *Abood*, this Court indicated that an agency shop might be the strictest type of union security arrangement that is constitutionally permissible. Agency fees also raise serious constitutional issues. All § 760 does is make it less likely that a nonmember's constitutional rights will be infringed upon. By holding that § 760 is unconstitutional, the Washington Supreme Court in essence held that the First Amendment requires what it barely allows. This Court should reject this holding.

CONCLUSION

For the reasons set forth above, this Court should hold that a state may not enforce an agency fee statute that allows a union to collect fees unrelated to its statutory responsibilities. Alternatively, this Court should hold that § 760 is constitutional, since the statute is a permissible balance between allowing an agency fee to be collected and protecting the free-speech and silence rights of nonmembers.

Respectfully submitted,

PATRICK J. WRIGHT (P54052)
Attorney for Amicus Curiae
Mackinac Center for Public Policy

627H

FILED
NOV 3 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 05-1589 & 05-1657 (consolidated)

In The

Supreme Court of the United States

GARY DAVENPORT, ET AL., *Petitioners*,

v.

WASHINGTON EDUCATION ASSOCIATION, *Respondent*.

WASHINGTON, *Petitioner*,

v.

WASHINGTON EDUCATION ASSOCIATION, *Respondent*.

On Certiorari to the Supreme Court of Washington

Brief of Amicus Curiae National Federation of Independent Business Legal Foundation Supporting Petitioners

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER
FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/237-2434 telephone
812/235-3685 facsimile

November 8, 2006

Table of Contents

Table of Authorities ..... (ii)

Statement of Interest 1

Summary of Argument 2

Argument 3

I. The Present Cases Are Not Campaign Finance Cases. 3

A. Washington Has Not Asserted a Prohibition Interest. 3

B. Unions and Corporations May Use Funds from Those Voluntarily Associating with Them for Any Lawful Purpose, Including Political Purposes. 6

II. Rational Basis Scrutiny Applies. 16

A. There Is No Nonmember Associational Interest. 17

B. Jus Tertii Interests May Not Be Raised. 19

C. WEA Has No Cognizable Burden. 23

III. A Nonmember Opt-In Requirement Is Rational in this Context of State Compulsion. 26

Conclusion 28

Table of Authorities

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 15

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 20

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) 9, 12-13, 26

Barrows v. Jackson, 366 U.S. 420 (1961) 21

Buckley v. Valeo, 424 U.S. 1 (1976) 4

California Med. Ass'n v. FEC, 453 U.S. 182 (1981) 8

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) 5, 8-13, 24, 25

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 9, 13, 15

Flast v. Cohen, 392 U.S. 83 (1968) 21

Leer v. Wash. Educ. Ass'n, 172 F.R.D. 439 (W.D. Wash.1997) 18

McConnell v. FEC, 540 U.S. 93 (2003) 3-6

McGowan v. Maryland, 346 U.S. 249 (1953) 21

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 26

Munn v. Illinois, 94 U.S. 113 (1884) 26

Singleton v. Wulff, 428 U.S. 106 (1976) 20-22

State ex rel. Public Disclosure Commission v. Washington Education Association, 130 P.3d 543 (Wash. 2006) 5, 17-18, 24-27

Wagner v. Prof'l Eng'rs in Calif. Gov't, 354 F.3d 1036 (9th Cir. 2004) 17

Constitution, Statutes, Regulations & Rules

2 U.S.C. § 431(17)(A 5

2 U.S.C. § 434(c)(2) (C) 11

2 U.S.C. § 441b 4

11 C.F.R. § 114.10 10

11 C.F.R. § 114.10(e) 12

U.S. Const. amend. I ..... *passim*

Wash. Rev. Code § 42.17.760 16

Other Authorities

2 Alexis de Toqueville, *Democracy in America* (P. Bradley ed. 1948) 8

47 Cong. Rec. S2631-51 (2001) 6

47 Cong. Rec. S2641 (2001). 7

www.irs.gov/taxstats 8

Statement of Interest[1]

The NFIB Legal Foundation, a 501(c)(3), tax-exempt public-interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB), the nation's leading small-business advocacy association, with offices in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files amicus briefs in the courts "tell[ing] judges how the decision they make in a given case will impact small businesses nationwide." *See* http://www.nfib.com/page/aboutLegal.html. NFIB's members own and operate many of America's independent businesses, which create two-thirds of the new jobs in the United States. NFIB has worked to defend limitations that protect non-union employees from unwittingly or unwillingly financially supporting political causes with which they do not agree.

---

[1]No "counsel for a party authored th[is] brief in whole or in part," and no "person or entity, other than the *amicus curiae*, its members, or its counsel, . . . made a monetary contribution to the preparation or submission of the brief." Rule 37.6. Letters of consent from all parties to the filing of this brief have been filed with the Clerk.

Summary of Argument

The two present cases are not campaign finance cases because the Washington Education Association ("WEA") is free to use general funds not received as the result of government compulsion for any lawful purpose, including political activity. So campaign finance decisions do not control this case.

WEA should be free to use money received from individuals who voluntarily associate with it for any lawful purpose, just as any voluntary association, including corporations (for-profit and nonprofit) and unions, should be free to do without any special notification to donors, members, or shareholders that funds received might be used for political purposes. In a voluntary association, the remedy for persons displeased with associated parties is persuasion if possible or terminating the relationship.

Because there is no constitutionally cognizable burden on WEA's association or expression rights, rational basis scrutiny should be applied, not strict scrutiny. The lower court erroneously relied on the third party rights of nonmembers of WEA who might wish to "associate" with WEA by having the nonchargeable portion of their agency shop fees used for WEA's political activity. But on this record, there is no evidence that such nonmembers even exist or that WEA should be permitted to assert jus tertii rights. All that would be necessary to vindicate the asserted association right of such hypothetical nonmembers would be for them to call WEA and give affirmative consent to such use of their nonchargeable fees. Such a ready remedy entirely eliminates WEA's jus tertii associational-interest argument and, along with it, the derivative argument that there is some heavy burden on WEA to vindicate that jus tertii associational interest. There is no burden on WEA's constitutional rights at all under these facts, so we need

only look for a rational basis for Washington's opt-in requirement.

The rational basis for an opt-in requirement is found in the specific context of the state compulsion present in Washington's decision to enact mandatory collection from nonmembers of agency shop fees that include nonchargeable amounts that WEA uses for political activity. In such a context of compulsion, there is a rational basis for including the opt-in provision to assure the protection of the free association and expression rights of nonmembers.

Argument

I. The Present Cases Are Not Campaign Finance Cases.

These cases are not about campaign finance because Washington has chosen not to prohibit corporate and political activity.[2] Since it has not asserted any interest in so restricting corporate and union political activity, WEA is absolutely free to spend its money for express political communications and political contributions.

A. Washington Has Not Asserted a Prohibition Interest.

While it may seem self-evident that the present consolidated cases are not campaign finance cases because the State of Washington has not asserted any interest in prohibiting corporations and unions from engaging in political activity, the Campaign Legal Center has sought to frame the issue as being about campaign finance. It devoted Part II of its brief urging this Court to grant certiorari to the argument that this Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), mandates

---

[2] *Political activity* is used herein to encompass *independent expenditures*, *electioneering communications*, and *contributions*, as those terms of art are defined in the Federal Election Campaign Act ("FECA").

an opt-in requirement. Brief *Amicus Curiae* of the Campaign Legal Center Supporting Petitioner at 8-12, *Washington v. Washington Education Association* (No. 05-1657). And it recited a history of campaign finance regulation, *id.* at 9-10, and a collection of campaign finance cases that supposedly support an opt-in requirement. *Id.* at 12.

The Campaign Legal Center relied in particular on a statement in *McConnell* to the effect (as the Campaign Legal Center put it) that "this Court, in *McConnell*, made clear the Court's 'unanimous view' that such an 'opt-in' procedure provides unions with a 'constitutionally sufficient' opportunity to engage in political speech." *Id.* at 11. But this Court's statement in *McConnell* had the specific precondition of a prohibition on corporate and union express advocacy:

> Since our decision in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)], Congress' power to *prohibit corporations and unions* from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law. The ability to form and administer separate segregated funds authorized by FECA § 316, 2 USC § 441b (main ed. and Supp 2003), has provided corporations and unions with a constitutionally sufficient opportunity to engage in *express advocacy*. That has been this Court's unanimous view, and it is not challenged in this litigation.

McConnell, 540 U.S. at 203 (footnote omitted) (emphasis added). So *McConnell*'s statement regarding "sufficien[cy]" had only to do with the PAC option where corporations and unions were prohibited from making independent expenditures,

i.e., communication which "expressly advocate the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17)(A) (definition of "independent expenditure"); *see FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238, 249 (1986) (prohibition on independent expenditures at 2 U.S.C. § 441b requires express advocacy construction to avoid vagueness and overbreadth).

But Washington has not prohibited corporations and unions from making independent expenditures or "electioneering communications" (some of which were facially held to be the "functional equivalent of express advocacy"). *Id.* at 206. The precondition (i.e., a prohibition) for this Court's statement in *McConnell* does not exist, and Washington has not required a PAC option for corporations and unions.

Since Washington has not asserted the interests that this Court has held may justify prohibiting corporate and union political activity, the present consolidated cases are not about the sufficiency of a PAC option to protect the First Amendment interests of corporations and unions. And the *McConnell* statement is inapplicable.

Rather, these cases are about Washington's effort to protect the rights and interests of individuals who are not union members in the unique context of Washington's compulsion of individuals who are not members of the union to pay "agency shop fees" that the union, the State, and the court below acknowledge include "nonchargeable expenses," i.e., union expenses used "to support political and ideological causes, which are unrelated to the union's collective bargaining activities on behalf of all employees." *State ex rel. Public Disclosure Commission v. Washington Education Association* ("*PDC*"), 130 P.3d 543, 549-50 (Wash. 2006) (en banc),

Appendix to Petition for Cert. in No. 05-1657 at 3a-4a [hereinafter "PDC App."].

While it is true that Washington may protect these nonmembers as it has done, it is not because *McConnell* approved the PAC option as sufficient to protect corporate and union express advocacy rights where a state prohibits them from express advocacy. Rather it is because Washington has a rational basis for extending this protection to nonmembers in order to protect their rights and interests in avoiding compelled association with the union and compelled expression in support of the union (by use of the nonchargeable portion of the nonmembers' agency shop fees). *See* Part III.

B. Unions and Corporations May Use Funds from Those Voluntarily Associating with Them for Any Lawful Purpose, Including Political Purposes.

The Campaign Legal Center did not state why it has attempted to frame these cases as campaign finance cases. Given the Center's ideological purpose, it is likely promoting an agenda that no corporation or union should be able to use money properly in its general fund for political activity (where not prohibited) unless it obtains express permission from any members, donors, or shareholders. Indeed, such a proposal was made when "paycheck protection" legislation similar to Washington's opt-in provision has been proposed in Congress. *See, e.g.*, 47 Cong. Rec. S2631-51 (2001)[3]

---

[3]Tabled Amendment No. 134 to the Bipartisan Campaign Act of 2001 would have required corporations and unions to obtain prior consent before using funds received from shareholders and union members and nonmembers for "political activity," defined to include voter registration, get out the vote activity, express advocacy, and advertizing or polling for political activities. For corporations, the prohibition on the use of its general funds for political activity without stockholder prior consent would have been applied (continued...)

This agenda should be rejected. Unions and corporations should be able to use funds received from those who *voluntarily* associate with them for any lawful purpose (which includes political activity in the absence of a prohibition). Where there is voluntary association with (including voluntary payment of money to) a corporation or union, the consent of members, donors, or shareholders should be assumed. The issue in the present cases revolves around voluntariness in the context of State adoption of agency shop law and compulsion of nonmembers to pay agency shop fees including nonchargeable expenses (although these may then be recovered by those willing to do what is required to recover what, for most individuals, would be considered a modest amount of money). This in turn raises the issues of compelled nonmember "association" with the union and compelled nonmember speech (by funding union speech). Apart from this unique compulsion context, WEA is, and should be, free to use any funds properly in its general fund for any lawful purpose (just as any union or corporation should be).

Since Washington has not prohibited political activity for corporations and unions, there is no occasion to revisit the constitutionality of such a prohibition in these cases. But it is important to examine a support sometimes urged for such a prohibition, i.e, protection of minority stockholders (or dissenting members or donors), because it is relevant to the pivotal issue of compulsion and voluntariness in the present cases.

Preliminarily, it should be noted that (absent compulsion) every corporation and union is a form of voluntary association and no one forces anyone to buy and hold stock in any corporation. Individuals identify with a corporation or union—by

---

[3](...continued)
"commensurate to the share of such stocks" in the general fund. 47 Cong. Rec. S2641 (2001).

membership or donation or shareholding—because they choose to do so. They choose to do so out of some perceived ideological or economic advantage to themselves, just as they decide whether or not to join a church, political party, civic league, food coop, or any other association. An astute observer of nineteenth-century America noted that "Americans of all ages, all conditions, and all dispositions constantly form associations." 2 Alexis de Toqueville, *Democracy in America* 106 (P. Bradley ed. 1948). And as to the corruption concerns that must underpin a prohibition on political activity, this Court held in *MCFL* that "[v]oluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form." *MCFL*, 479 U.S. at 263.

As information about incorporation and its advantages has become readily and inexpensively available, the number of these voluntary associations that choose to become corporations has mushroomed. *See* www.irs.gov/taxstats. By simply typing "how to incorporate" or similar words into an Internet search engine, an individual can now find numerous websites providing information on the benefits of incorporation (especially avoiding personal liability), and can do so without consulting a lawyer or even going to a library. At a very modest cost they can also obtain needed incorporation forms and actually incorporate through an online service. Incorporation is no longer the bailiwick of a few behemoths. It is now the preferred and most effective mode of existence for even mom-and-pop shops and diminutive advocacy groups. For these "little guys," most of their assets and readily available resources may be tied up in their corporations, so that political activity is best done through the corporation itself, not through yet another voluntary association (a PAC) that the corporation may establish, but which is not the *same* voluntary association that incorporated. *California Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981)

("[The] claim that [a PAC] is merely the mouthpiece of [the sponsoring organization] is untenable. [The PAC] instead is a separate legal entity that receives funds from multiple sources and that engages in independent political advocacy."). This Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978), rightly eschewed the presumption that "corporations are wealthy and powerful and their views may drown out other points of view" and held, in 1986, that the burdens of such PACs could inhibit political activity, especially by groups of modest means. *MCFL*, 249 U.S. at 251-56 (plurality opin.); *id.* at 266 (O'Connor, J., concurring). That remains even more true today.

Many corporations, small and large, often perceive an advantage in engaging in political activity *as* a corporation, i.e., it is the corporation using its own assets to speak on some public issue concerning which the corporation itself has experience, expertise, and credibility.[4] This is especially true of

---

[4]In his dissent in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), Justice Scalia noted Alexis de Tocqueville's observation that "'[g]overnments . . . should not be the only active powers; associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of conditions has swept away.'" *Id.* at 694 (citation omitted). Justice Scalia noted that in the *Austin* fact situation it was important for voters to hear the view of the Chamber *as* the Chamber providing the "information that private associations owning and operating a vast percentage of the industry of the State, and employing a large number of its citizens, believe that the election of a particular candidate is important to their prosperity." *Id.* Justice Kennedy, joined by Justices O'Connor and Scalia, also argued at length concerning the burdens and deficiencies of the PAC option, *id.* at 708-09, noting,

> The secondhand endorsement structure . . . debases the value of the voice of nonprofit corporate speakers. The public is not interested in what the PAC says; it does care about what the group itself says, so that the group itself can be given credit or blame for the

(continued...)

nonprofit, ideological corporations, whether or not they qualify for the exception to the prohibition on political activity that was recognized by this court in *MCFL*, 479 U.S. at 256-65, as woodenly applied by the Federal Election Commission ("FEC") to "qualified nonprofit corporations" ("QNCs"). *See* 11 C.F.R. § 114.10.

As to the question of voluntary association with an ideological nonprofit corporation, this Court in *MCFL* said that people associate with such corporations precisely because of their ideological advocacy. 479 U.S. at 259 ("The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace."). It developed this idea at length as follows:

> Individuals who contribute to [MCFL] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political

---

[4](...continued)
candidates it has endorsed or opposed. PAC's suffer from a poor public image.

Id. at 708.

> purposes of the organization and contributor. In addition, an individual desiring more direct control over the use of his or her money can simply earmark the contribution for a specific purpose, an option whose availability does not depend on the applicability of § 441b. Cf. [2 U.S.C.] § 434(c)(2) (C) (entities other than political committees must disclose names of those persons making earmarked contributions over $200). Finally, a contributor dissatisfied with how funds are used can simply stop contributing.

MCFL, 479 U.S. at 260-61. In sum, people voluntarily associate with and donate to nonprofit ideological corporations. And the same logic applies whether or not they fit the FEC's overly-restrictive definition of a QNC. Therefore, such nonprofits should be free to use donations (and membership dues if applicable) for any lawful purpose (which in the present case would include political activity because Washington has not prohibited it).[5]

---

[5] *MCFL* addressed a related concern as follows:

> The Commission maintains that, even if contributors may be aware that a contribution to appellee will be used for political purposes in general, they may not wish such money to be used for electoral campaigns in particular. That is, persons may desire that an organization use their contributions to further a certain cause, but may not want the organization to use their money to urge support for or opposition to political candidates solely on the basis of that cause. This concern can be met, however, by means far more narrowly tailored and less burdensome than § 441b's restriction on direct expenditures: simply requiring that contributors be informed that their money

(continued...)

A key case as to voluntariness is *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), although the voluntariness was only a secondary consideration in the Court's analysis and not the compelling state interest on which this Court relied to find Michigan's prohibition constitutional as applied to the Chamber. *Austin* approved Michigan's prohibition on corporate (but not union) independent expenditures as applied to the Chamber, even though it was a nonprofit corporation.

The *Austin* majority employed strict scrutiny because the PAC option "burden[ed] expressive activity." *Id.* at 658. For a compelling state interest, *Austin* relied solely on the potential for "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. *Austin* only addressed dissenting member issues in stating that the Chamber was not entitled to the *MCFL*-corporation exception, deciding that because of various member benefits

---

[5](...continued)

may be used for such a purpose.

479 U.S. at 261. *MCFL* only held that the prohibition on independent expenditures could not be justified with the FEC's rationale because a less restrictive means was readily identifiable. The FEC, however, created a rule requiring that "[w]henever a qualified nonprofit corporation solicits donations, the solicitation shall inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates." 11 C.F.R. § 114.10(e). This rule has not been tested as to constitutionality and amicus curiae does not concede it, believing that the immediately preceding rationale in *MCFL* would have adequately answered the FEC's argument, i.e., that individuals pool their money in advocacy organizations precisely for the purpose of most effectively advocating ideas, which advocacy may reasonably be expected to include independent expenditures (a common activity of ideological nonprofits), and that if donors do not like what the nonprofit is doing they can simply stop donating.

"the Chamber's members are more similar to shareholders of a business corporation than to the members of MCFL." *Id.* at 663.

Although this Court in *Austin* did not rely on protection of minority viewpoints (at the expense of majority viewpoints) as the compelling interest in deciding the case, "Justice Brennan's concurrence," as Justice Scalia described it, "would have us believe that the prohibition adopted by Michigan and approved by the Court is a paternalistic measure to protect the corporate shareholders." *Id.* at 685-86. Justice Scalia responded that this view was, first, "implausible":

> But such solicitude is a most implausible explanation for the Michigan statute, inasmuch as it permits corporations to take as many ideological and political positions as they please, so long as they are not "in assistance of, or in opposition to, the nomination or election of a candidate." Mich. Comp. Laws § 169.206(1) (1979). That is indeed the Court's sole basis for distinguishing First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), which invalidated restriction of a corporation's general political speech. The Michigan law appears to be designed, in other words, neither to protect shareholders, nor even (impermissibly) to "balance" general political debate, but to protect political candidates. Given the degree of political sophistication that ought to attend the exercise of our constitutional responsibilities, it is regrettable that this should come as a surprise.

Id. at 686.

He added, second, that even shareholders of for-profit corporations "know" of such a possibility to which "the shareholder exposes himself":

> But even if the object of the prohibition could plausibly be portrayed as the protection of shareholders (which the Court's opinion, at least, does not even assert), that would not suffice as a "compelling need" to support this blatant restriction upon core political speech. A person becomes a member of that form of association known as a for-profit corporation in order to pursue economic objectives, *i.e.*, to make money. Some corporate charters may specify the line of commerce to which the company is limited, but even that can be amended by shareholder vote. Thus, in joining such an association, the shareholder knows that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit. That is the deal. The corporate actions to which the shareholder exposes himself, therefore, include many things that he may find politically or ideologically uncongenial: investment in South Africa, operation of an abortion clinic, publication of a pornographic magazine, or even publication of a newspaper that adopts absurd political views and makes catastrophic political endorsements. His only protections against such assaults upon his ideological commitments are (1) his ability to persuade a majority (or the requisite minority) of

> his fellow shareholders that the action should not be taken, and ultimately (2) his ability to sell his stock. (The latter course, by the way, does not ordinarily involve the severe psychic trauma or economic disaster that Justice BRENNAN's opinion suggests.) It seems to me entirely fanciful, in other words, to suggest that the Michigan statute makes any significant contribution toward insulating the exclusively profit-motivated shareholder from the rude world of politics and ideology.

Id. at 686-87. *See also id.* at 687 (Justice Scalia arguing that "the individual member's ideological trauma" would be as great if the incorporated association with which he was associated endorsed a candidate of whom he disapproved whether it was a business corporation or an *MCFL*-corporation, so that such trauma did not support the prohibition).

Justice Kennedy, joined by Justices O'Connor and Scalia, similarly disputed any reliance on an "interest in protecting members." *Id.* at 709-10. They noted that Americans form associations, which incorporate, and that silencing such groups "is to silence some of the most significant participants in the American public dialogue." *Id.* at 710. "To the extent that members disagree with a nonprofit corporation's policies," they argued, "they can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own." *Id.* at 710. They also argued that

> Abood v. Detroit Board of Education, 431 U.S. 209 (1977)[,] . . . does not apply here, as the disincentives to dissociate are not comparable. Bellotti, [435 U.S.] at 794, n. 34 (noting "crucial distinction" between union members and

> shareholders). One need not become a member of the Michigan Chamber of Commerce or the Sierra Club in order to earn a living.

Id. at 709-10.

This brings us back to the focus on the present case, which is on union activity. Just as nonprofit and for-profit corporations are free to spend their general treasury funds for any lawful purpose, so are unions—with a limited exception when nonvoluntariness is present, which is the topic of Part III. Thus, to the extent that association with and payments to a union are fully voluntary, unions too are free to spend their general funds for any lawful purpose, which in Washington includes political activity.

II. Rational Basis Scrutiny Applies.

The challenged provision in no way limits the speech or associational rights of WEA. It simply declares:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

Wash. Rev. Code § 42.17.760.

This provision does not prohibit WEA from freely using money properly in its general treasury for any lawful purpose, including political activity that Washington has not prohibited. It does not limit in any way the ability of the union and individuals who have voluntarily chosen to associate with the union, i.e., union members, to associate, pay and receive membership

dues, take joint actions, and express themselves publicly and politically.

A. There Is No Nonmember Associational Interest.

The lower court, however, found an association interest between WEA and individuals who have chosen not to associate with the union by becoming members: "For those nonmembers who agree with the union's political expenditures, § 760's presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues." *PDC*, 130 P.3d at 562, PDC App. at 20a. But it was wrong.

Preliminarily, the lower court's phrase "presumption of dissent" in the quoted passage is not proper because the phrase itself contains a presumption—a presumption that the only reason that a nonmember might not want her dues used for the union's political expenditures is dissent. The nonmember might actually agree with what the union is doing or have no opinion, but in any event want to simply stay out of involvement with political activity in this fashion (for whatever personal reason she might have, out of a vast range of possibilities). The lower court actually acknowledged this, but it failed to comprehend the implications of its argument for its own analysis:

> A presumption of dissent violates the First Amendment rights of nonmembers as well. A presumption of dissent fails to respect the nonmember's First Amendment rights as "running both ways." *Wagner v. Prof'l Eng'rs in Calif. Gov't*, 354 F.3d 1036, 1043 (9th Cir. 2004). It assumes that because an employee has not joined the union, he or she disagrees with the union's political expenditures. However, there are numerous and varied reasons why employ-

> ees choose not to join a union. *Leer v. Wash. Educ. Ass'n*, 172 F.R.D. 439, 446-47 (W.D. Wash.1997) (nonmembers do not have unanimity of purpose). Employees may choose to remain nonmembers for many reasons unrelated to political expression. For those nonmembers who agree with the union's political expenditures, § 760's presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues.

PDC, 130 P.3d at 561-62, PDC App. at 20a-21a. Although it acknowledged that a presumption of dissent was improper factually, the lower court repeatedly argued that the State was deploying a presumption of dissent in § 706. *Id.* at 560-62, PDC App. at 17a-21a. But, as the court itself argued, there is no basis for presuming "dissent," and doing so is improper.

If an assumption of dissent is groundless and improper, then there is similarly no basis to presume the desire of some nonmembers to associate with and financially support WEA's political activities. The lower court assumed that some *non*-members actually agree with the union's political expenditures and want to associate with it by having the nonchargeable portion of their agency shop fees used by the union for political activities. The lower court pointed to no evidence that nonmembers who support the union's political expenditures even *exist*, let alone that they would want to express that support by associating with the union after they chose not to be members and that they would want to express that association by having

their compelled fee payments used for WEA's political activity.[6] On this record, such members do not exist.

No such secretly-financially-supportive-nonmember has been identified, and none has come forward to assert her right to associate with WEA in these cases. As with unrequited love, it is difficult to identify any associational relationship (or constitutionally cognizable interest or right) when only WEA wants to associate and the nonmember, by definition, has already rebuffed WEA's advances.

B. Jus Tertii Interests May Not Be Raised.

This raises the question of why the lower court was even considering the association right of such nonmembers. There are standards for asserting the rights of third parties not before this Court. Neither WEA nor the lower court have provided any argument as to why the rights of secretly-financially-supportive-nonmembers should be considered under traditional jus tertii rules, especially in a context where no such nonmember has been identified as actually existing and there is no evidence of any such nonmember asserting in any way (or being unable to assert) an "associational" right or interest in funding WEA's political speech.[7]

---

[6]There is no evidence of such nonmembers in the Stipulation of Facts, Violations and Recommendations into which the WEA entered before the Washington Public Disclosure Commission. PDC App. at 121. The trial court made no finding that such nonmembers exist and did not even discuss them hypothetically in any opinion, order, or judgment. PDC App. at 115a, 102a, 84a, 81a, 79a. In particular, the trial court's Findings of Fact and Conclusions of Law made no such finding. PDC at 92a. As noted in text, the State Supreme Court cited no evidence for them. WEA's Brief in Opposition to the certiorari petitions before this Court likewise pointed to no evidence for them.

[7]If any such members actually exist, amicus curiae has not discovered (continued...)

An example of jus tertii analysis is *Singleton v. Wulff*, 428 U.S. 106 (1976). In that case, this Court determined that physicians could raise the rights of patients in an action challenging Missouri's refusal to fund abortions not "medically indicated" under its Medicaid program. *Id.* at 108 (four-Justice plurality); *id.* at 121-22 (Stevens, J., concurring) (questioning the logic of the other four but concurring because the physicians already had standing of their own).

Justice Blackmun, writing the plurality opinion, noted that "[f]ederal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons . . . ." *Id.* at 113. The first reason was that unnecessary adjudication of such rights should be avoided and the holders of the rights might not wish to assert them or might be able to enjoy them regardless of the litigation outcome. *Id.* at 113-14 (*citing Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring)). The second reason was that the best defenders of jus tertii were usually the third parties themselves. *Id.* at 114. Third parties might have a preference for defending their own rights, as they would be bound by stare decisis. *Id.*

---

[7](...continued)

any reason why they could not just give the amount of money in question to the union for political activities—or simply call WEA and give oral consent to the use of the nonchargeable portions of their agency shop fees— thereby engaging in the partial "association" they allegedly desire without the fuller association of membership. Evidence of people doing this would provide some evidence of (a) the existence of such members and (b) an actual desire to associate as the lower court presumes that they do—but it would also undercut any argument based on protecting such nonmembers' interest in such partial "association" because the evidence would show that they may easily "associate" in this fashion if desired. The absence of any such evidence in the record—or of an explanation of why it would not be possible to produce it—is telling.

Justice Blackmun noted that from these two considerations came the general rule: "Ordinarily one may not claim standing in this court to vindicate the constitutional rights of some third party." *Id.* (*citing McGowan v. Maryland*, 346 U.S. 249, 255 (1953), *quoting Barrows v. Jackson*, 366 U.S. 420, 429 (1961); *Flast v. Cohen*, 392 U.S. 83, 99 n.20 (1968)). Justice Blackmun continued, stating that the general rule should not apply when its underlying rationale is missing. *Id.* at 114. There are two elements this Court examines to determine if an exception should be made. First, the court examines the relationship of the litigant and the third party to see if the latter's "right is inextricably bound up with the activity the litigant wishes to pursue." *Id.* Second, the Court determines whether "some genuine obstacle" exists to prevent the third party from asserting its own right." *Id.* at 116.

As to the "relationship" test, in *Singleton* the plurality relied on the traditional confidential nature of the doctor-patient relationship and the necessity of a physician to the performance of an abortion to determine that the physician was uniquely qualified to advocate the right of patients seeking an abortion with state funding. *Id.* at 117. As to the "obstacle" test, the plurality noted that (a) women might be chilled from asserting their own rights by a desire to protect their privacy and (b) mootness was always at least a technical problem with pregnancy. *Id.* at 117-18.

In the present case, there is no special "relationship" between WEA and persons who have expressly rejected a relationship by remaining nonmembers. The rights of such nonmembers are in no way inextricably intertwined with WEA's political activity. As noted above, if such nonmembers want their nonchargeable fees used by WEA (and there is no evidence that anyone does) the nonmembers can simply call up WEA and give affirmative consent. That none have apparently

done so indicates that they have no interest in doing so, not that WEA now gets to assert these nonmembers' purported rights in an association relationship that they have formally rejected.

As to the "obstacle" test, the presence of nonmembers asserting their own rights in the present *Davenport* case (No. 05-1598) indicates that there is no obstacle to these nonmembers asserting their rights. And the rights that these nonmembers are asserting are not the rights that WEA says at least some nonmembers want to assert. As to an interest in privacy mentioned in *Singleton*, that interest cuts against WEA's argument. The opt-in requirement is the most private way for members to assert their interest concerning association with WEA's political activity. Under an opt-in requirement, a nonmember does not have to say anything in order to be excluded. Under an opt-out scheme, the nonmember must stand up amid disagreeing peers, her boss, and union officials and state yet again a desire to not "associate" with WEA and its political activity. To avoid this decidedly un-private moment, many likely take the path of least resistance (a common trait of human beings). By contrast, the most "private" thing one can do in a union setting is to just be a member, so as not to stick out from the crowd. If one decides to not be a member, the next most private thing to do is to not fuss about WEA using your nonchargeable money.

It is readily seen from this brief discussion that the rights of these hypothetical nonmembers should not have even been considered by the lower court. There is no basis for considering any association rights of nonmembers in these cases.[8]

---

[8]Perhaps WEA will argue, as the lower court did, that the burden of proof is on the Petitioners here. So maybe it should be Petitioners' duty to show that there are *not* secretly-financially-supportive-nonmembers out there. But burdens start shifting to Petitioners only if there is a con-

(continued...)

C. WEA Has No Cognizable Burden.

This leaves only one other possible constitutional burden—the alleged burden on WEA's First Amendment rights resulting from having to ask for permission from these hypothetical, secretly-financially-supportive-nonmembers to use the nonchargeable portion of their agency dues for WEA's political activity. WEA cannot properly complain of not being able to use anyone else's money because (a) they already have the money of members, (b) they cannot have the money of persons who have chosen to go public through the opt-out *Hudson* procedure, and (c) they should not be heard to complain about not being able to use the funds of those who secretly oppose the union's political activity (or for any of a range reasons do not want the union using their money for political activity even if they do not oppose the union's activity) because that would violate the rights and interests of those nonmembers (which WEA surely would not wish to do). So WEA's alleged burden extends only to getting consent from those secretly-financially-supportive-nonmembers, if they exist. And this "burden" interest is analytically derivative of the "association" interest, i.e., if the alleged association interest of nonmembers can be

---

[8](...continued)
stitutionally-cognizable burden on WEA's rights. WEA must establish that burden, which seems impossible on these facts, and in any event has not been done. Only after that burden is established would any burdens shift to the State to prove narrow tailoring to a compelling interest. To establish that there even is a burden its First Amendment rights, WEA must demonstrate that there actually are secretly-financially-supportive-nonmembers whose third-party rights may legitimately be asserted here and whose interest in "association" with WEA may not be easily accommodated by actions that impose a near-weightless burden. So WEA cannot shift the burden before that point and Washington need not prove the absence of secretly-financially-supportive-nonmembers.

readily accommodated without any cognizable burden, then the "burden" interest entirely evaporates.

The lower court described WEA's burden in attempting to solicit secretly-financially-supportive-nonmembers as onerous, citing, inter alia, *MCFL*, 479 U.S. 238. *PDC*, 130 P.3d at 560-61, 569-70, PDC App. at 19a-20a, 31a-32a. But the burden *MCFL* described was the full burden of PAC compliance, which is not in any way at issue here. WEA has no such burden. As shown next, it does not even have a constitutionally cognizable burden.

Since WEA already sends out *Hudson* packets twice a year, *Id.* at 550, PDC App. at 4a, it only needs to add a checkbox on a return card in that packet seeking the required affirmative consent. Or it could mail that response card to the approximately 3,500 nonmembers. *Id.*, PDC App. at 4a. Or it could call the nonmembers to see if they will consent. PDC App. at 138a (§ 760 does not require that consent be in writing). Or it could simply add one printed line in its *Hudson* materials asking nonmembers to call WEA to approve use of the nonchargeable portion of their agency shop fees for political activity. This is a minuscule burden, but it can be made infinitesimal.

If the foregoing options are yet too great a "burden" in WEA's eyes, it could simply advise nonmembers (in writing or orally) one time at the beginning of the nonmember's employment that any time the nonmember wants to have the nonchargeable amount of her agency shop fees used for WEA's political activity she needs only to call WEA and say so. Or the employer could even do this if WEA believes this momentary statement of the option is yet too heavy a burden.

Any of these listed options would provide fully adequate protection for the asserted interests of secretly-financially-supportive-nonmembers and WEA in asking them to please

reconsider "association" with WEA at some level by allowing WEA to use nonchargeable fees for political activity. The fact that WEA may not like these options (as evidenced by the present lawsuit),[9] does not eliminate the fact that the asserted "associational" interest between such likely-hypothetical nonmembers and WEA can readily be accommodated with an infinitesimal "burden." This eliminates both the nonmember "associational" interest and the "burden" on WEA argument entirely.

None of these listed options is a substantial burden for the chance of recovering between $154,000 and $266,000 per year for WEA to spend on political activity.[10] If, as WEA and the lower court assure us, there really are secretly-financially-supportive-nonmembers out there waiting to give their consent to use their money, WEA could readily offset any minuscule or infinitesimal expense with the bountiful dollars it will receive, and which it will then be able to use with a clear conscience, unconcerned over the possibility of having burdened any nonmember's rights and interests in not being compelled to associate and speak. The alleged burdens on WEA's First Amendment interests and hypothetical nonmembers are so low as to be constitutionally noncognizable. *See, e.g.*, *MCFL*, 479 U.S. at 256 ("When a statutory provision *burdens* First Amendment rights, it must be justified by a compelling state interest."

---

[9]It may safely be presumed that the opt-*in* requirement reduces the amount of money that WEA might have to spend for political activity as a result of nonmember inaction if Washington instead had an opt-*out* requirement. But obtaining more nonchargeable portions of nonmembers' compelled agency shop fees for WEA is not a cognizable interest and has no place in the present analysis.

[10]There are approximately 3,500 nonmembers and the nonchargeable amounts vary from $44 to $76, resulting in the amounts calculated. *PDC*, 130 P.3d at 550-51.

(emphasis added)). *See also Austin*, 494 U.S. at 658 ("requirements . . . burden expressive activity" and so "must be justified by a compelling state interest").

Therefore, rational-basis inquiry is appropriate here. Absent any burden on association or expression rights, rational-basis review is required in these cases. *See, e.g., McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995) (the "ordinary litigation" standard). "For protection against abuses by legislatures the people must resort to the polls, not to the courts." *Munn v. Illinois*, 94 U.S. 113, 134 (1884). So Washington and Davenport et al. have no burden of proving narrow tailoring to a compelling state interest. And any statements in the lower court's opinion about failure of proof may not be applied to the State but must be applied to WEA. *See, e.g., PDC*, 130 P.3d at 565, PDC App. at 26a ("The State has failed to even attempt to justify § 760, which it is required to do when regulating First Amendment rights."). So what the lower court said first about the standard of review applies to these cases:

> A party challenging the constitutionality of a statute bears the burden of establishing its unconstitutionality beyond a reasonable doubt. A statute is presumed constitutional, and all doubts are resolved in favor of constitutionality.

Id. at 556, PDC App. at 4a (citations omitted). As shown next, Washington's opt-in requirement readily meets this standard.

III. A Nonmember Opt-In Requirement Is Rational in this Context of State Compulsion.

Washington's opt-in requirement has a rational basis. It is protecting nonmembers in the context of compulsion that Washington has created by mandating the payment of agency shop fees that include nonchargeable amounts and requiring

those who wish to opt-out of membership to go public in a workplace filled with those of a different view with the fact that they do not wish to belong to the union.

This context of compulsion makes rational an opt-in procedure designed to assure that there is no additional compulsion to "associate" with a union or support its political expression by having nonchargeable amounts used for union political activity unless the nonmember chooses to opt *out* of having her funds so used. It is rational in this context of compulsion to protect the free association and free expression rights and interests of nonmembers by requiring the WEA to get the nonmembers' affirmative assent before using nonmembers' nonchargeable agency shop fees for political purposes.

While it is true that WEA is, and should be, free to use the membership fees of those who voluntarily associate with it for any lawful purpose, nonmembers by definition have not voluntarily associated with the union. If a nonmember simply makes a phone call to WEA approving the use of her nonchargeable fees for WEA political activity, then she has voluntarily "associated" with WEA at least to that extent. An assumption of association by her inaction fails to take into account the social dynamics of sticking one's neck out in the midst of people hostile to one's position for a mere $44 to $76. *PDC*, 130 P.3d at 551, PDC App. at 4a. It is rational for Washington to believe that some nonmembers will not wish to take this additional step of disassociation from their peers for such a modest amount of money and will just let the money go despite the violation of their rights and interests in free association and expression. It is rational for Washington to protect these peoples, especially when the burden is so infinitesimal on WEA to simply give those who might actually want to let their funds by used (although they have never been proven to exist) the option to call WEA and give consent.

Conclusion

For the foregoing reasons, the Court should rule in Petitioners' favor and reverse the lower court.

Respectfully submitted,

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER
FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/235-3685 facsimile

NOV 7 2005

Nos. 05-1657 and 05-1589

In the

Supreme Court of the United States

STATE OF WASHINGTON
and GARY DAVENPORT, et al.,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

DEBORAH J. LA FETRA
TIMOTHY SANDEFUR
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

To prevent labor unions from subsidizing their political activities with agency fees exacted from the paychecks of nonmember workers, Washington State enacted a law requiring unions to obtain affirmative consent from workers before using this money for political activism. Does this law violate the First Amendment rights of the union?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

I. DISSENTING WORKERS HAVE AN IMPORTANT FIRST AMENDMENT RIGHT NOT TO CONTRIBUTE TO POLITICAL ACTIVITIES WITH WHICH THEY DISAGREE 4

II. LABOR UNIONS HAVE REPEATEDLY ABUSED THEIR POWER TO TAKE WORKERS' EARNINGS 6

A. Unions Routinely Use Their Authority to Fund Political Campaigns Contrary to Workers' Beliefs 6

B. Workers Are Being Denied the Protections Promised by This Court's Rulings in Dues and Fees Cases 7

C. Unions Are Engaged in "Massive Resistance" Against This Court's Rulings 11

III. THE COURT SHOULD ADOPT A PRESUMPTION OF DISSENT IN LABOR UNION COMPELLED SPEECH CASES 13

A. Requiring Workers to Assert Dissent Is Inconsistent With the Strict Scrutiny Standard 14

TABLE OF CONTENTS—Continued

Page

B. The Presumption That Workers Acquiesce in Supporting Unions Violates the Logical Presumption of Liberty 16

C. Requiring Workers to Assert Objection Chills Dissent 18

D. Abandoning the Requirement That Workers Affirmatively Object to the Spending of Their Money on Political Campaigns Would Not Implicate *Stare Decisis* 21

1. The *Street* Presumption of Conformity Was Dicta 21

2. Even if the Presumption of Conformity Is a Rule of Law, It Should Be Overruled 22

IV. PROCEDURAL DUE PROCESS CASES SUGGEST THE KIND OF PROTECTIONS THIS COURT OUGHT TO ADOPT IN COMPELLED SPEECH CASES LIKE THIS ONE 24

A. When Taking Property or Liberty from Citizens, Due Process Requires a Pre-Deprivation Procedure Whenever Feasible 24

B. Requiring Workers to "Opt-In" Is the Most Effective "Concrete Constitutional Guideline" for Assuring Pre-Deprivation Protection for Workers 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) ..... passim

Adkins v. Children's Hosp. of the Dist. of Columbia, 261 U.S. 525 (1923) 17

Armstrong v. Manzo, 380 U.S. 545 (1965) 24

Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen,
373 U.S. 113 (1963) 21

Brosterhous v. State Bar of Cal.,
906 P.2d 1242 (Cal. 1995) 1

Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986) ..... passim

Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 2, 14

Communications Workers of America v. Beck, 487 U.S. 735 (1988) ..... passim

Cumero v. Pub. Employment Relations Bd.,
778 P.2d 174 (Cal. 1989) 1

Cummings v. Connell, 316 F.3d 886 (9th Cir. 2003) 11

Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987) 11

Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 15

Dickerson v. United States, 530 U.S. 428 (2000) 26-27

TABLE OF AUTHORITIES—Continued

Page

Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees, 466 U.S. 435 (1984) 1, 26

Ferriso v. NLRB, 125 F.3d 865 (D.C. Cir. 1997) 9

Glasser v. United States, 315 U.S. 60 (1942) 15

Goldberg v. Kelly, 397 U.S. 254 (1970) 24-25

Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968) 13

Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) 21

In re Winship, 397 U.S. 358 (1970) 16

Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961) ..... passim

Keller v. State Bar of Cal., 496 U.S. 1 (1990) 1

Ky. Educators Pub. Affairs Council v. Ky. Registry of Election Fin., 677 F.2d 1125 (6th Cir. 1982) 17

Lawrence v. Texas, 539 U.S. 558 (2003) 17, 23

Lee v. Weisman, 505 U.S. 577 (1992) 5

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 1, 5, 8

Lutz v. Int'l Ass'n of Machinists & Aerospace Workers, 121 F. Supp. 2d 498 (E.D. Va. 2000) 11

Masiello v. U.S. Airways, Inc., 113 F. Supp. 2d 870 (W.D.N.C. 2000) 11

Mathews v. Eldridge, 424 U.S. 319 (1976) 3, 24-25

TABLE OF AUTHORITIES—Continued

Page

Michigan State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997) 5, 26-27

Miranda v. Arizona, 384 U.S. 436 (1966) 3, 26-27

NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449 (1958) 5-6, 17, 19-20

NLRB v. Ancor Concepts, Inc., 166 F.3d 55 (2d Cir. 1999) 9

Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio, 301 U.S. 292 (1937) 14

Parratt v. Taylor, 451 U.S. 527 (1981) 3, 25

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 22-23

Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000) 11

Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) 4

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 2, 14

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 5

Shea v. Int'l Ass'n of Machinists & Aerospace Workers, 154 F.3d 508 (5th Cir. 1998) 11, 13

State ex rel. Washington State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n, 130 P.3d 352 (Wash. 2006) 22

Swift & Co., Inc. v. Wickham, 382 U.S. 111 (1965) 22

TABLE OF AUTHORITIES—Continued

Page

Tavernor v. Ill. Fed'n of Teachers,
226 F.3d 842 (7th Cir. 2000) 11

Texas v. Johnson, 491 U.S. 397 (1989) 16

Tierney v. City of Toledo,
824 F.2d 1497 (6th Cir. 1987) 11

United States v. Carolene Products Co.,
304 U.S. 144 (1938) 15

United States v. Rumely, 345 U.S. 41 (1953) 6, 20

United States v. U.S. Gypsum Co.,
67 F. Supp. 397 (D.D.C. 1946), *overruled on other grounds*, 333 U.S. 364 (1948) 18

United States v. United Foods, Inc.,
533 U.S. 405 (2001) 4

Washington v. Seattle Sch. Dist. No. 1,
458 U.S. 457 (1982) 6

West Virginia State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 4

Whitney v. California, 274 U.S. 357 (1927) 16

Wooley v. Maynard, 430 U.S. 705 (1977) 4

United States Constitution

U.S. Const. amend. I ..... passim

U.S. Const. amend. V 16, 27

U.S. Const. amend. XIV 16

Rule of Court

Sup. Ct. R. 37.3(a) 1

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

1 Greenleaf, Simon, *Evidence* § 74 (10th ed. 1860) 18

Adams, R. Bradley, *Note: Union Dues and Politics: Workers Speak Out Against Unions Speaking for Them*, 10 U. Fla. J.L. & Pub. Pol'y 207 (1998) 5

American Fed'n of Television & Recording Artists, 327 N.L.R.B. 474 (1999) 9

Barnett, Randy E., *Restoring the Lost Constitution: The Presumption of Liberty* (2004) 16

Brown, Tom & Blethen, Ryan, *State's Campaign Cleanup a Washout?*, Seattle Times, Aug. 3, 1997, at A1, *available at* 1997 WLNR 1453262 11

Burns, David M., *Requiring Unions to Notify Covered Employees of Their Right to Be an Agency Fee Payer in the Post Beck Era*, 48 Cath. U. L. Rev. 475 (1999) 12

California Saw & Knife Works, 320 N.L.R.B. 224 (1995) 9

Canfield, Jeff, *What A Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001) 8

Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377, Case No. 8-CB-9415-1, 2004 WL 298352 (N.L.R.B. Feb. 11, 2004) 8

Chavez, Linda & Gray, Daniel, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* (2004) 5-7, 12, 19

TABLE OF AUTHORITIES—Continued

Page

de Jasay, Anthony,
Justice and Its Surroundings (2002) 18

Framing the Issue: AFL-CIO:
A "Business" in Trouble?,
2 No. 11 Fed. Emp. L. Insider 5 (July 2005) 7

Hayek, Friedrich A.,
The Constitution of Liberty (1960) 5

Hearings Before the Subcommittee on
Employer-Employee Relations of the Committee
on Economic and Educational Opportunities,
on H.R. 3580, The Worker Right to Know Act,
Serial No. 104-66 (104th Cong. 2d Sess. 1996)
at 111 (Statement of W. James Young) 8-9, 12

Hunter, Robert P., Mackinac Ctr. for Pub. Policy,
Paycheck Protection in Michigan (1998) 12

Kalven, Harry, Jr., *The Concept of the Public*
Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1 16

Knollenberg, Joe, *The Changing of the Guard:*
Republicans Take on Labor and the Use of
Mandatory Dues or Fees for Political
Purposes, 35 Harv. J. on Legis. 347 (1998) 12

Kochkodin, Michael C., *A Good Politician*
Is One That Stays Bought: An Examination
of Paycheck Protection Acts and Their Impact
on Union Political Campaign Spending,
2 U. Pa. J. Lab. & Emp. L. 807 (2000) 9-10

La Fetra, Deborah J., *Recent Developments*
in Mandatory Student Fee Cases,
10 J.L. & Pol. 579 (1994) 1

TABLE OF AUTHORITIES—Continued

Page

Larkin, Murl A., *Presumptions*, 30 Hous. L. Rev. 241 (1993) 16

Leef, George C., *Free Choice for Workers: A History of the Right to Work Movement* (2005) ... 12, 19

Local 74, Serv. Employees Int'l Union, 323 N.L.R.B. 289 (1997) 8

Lynch, Michael W., *The Summer of Reform: Campaign Finance Laws Return to the Congressional Agenda*, Reason, Aug. 18, 1998, at 7, *available at* 1998 WLNR 4378163 10-11

Monson Trucking Inc., 324 N.L.R.B. 933 (1997) 8

Office & Prof'l Employees Int'l Union, Local 29, AFL-CIO, 331 N.L.R.B. 48 (2000) 12

Paycheck Protection Act, 144 Cong. Rec. H1748 (daily ed. Mar. 30, 1998) (statement of Rep. Cunningham) 7

Reitz, Michael, *Paychecks Unprotected*, Labor Watch, Jan. 2006 10

Rothbard, Murray N., *Man, Economy, and State* (1970) (1962) 5

Settlement Agreement between State of Washington and WEA, Feb. 26, 1998, *available at* http://www.atg.wa.gov/pubs/wea_setl.html (last visited Nov. 2, 2006) 10

Stratmann, Thomas, *How Reelection Constituencies Matter: Evidence from Political Action Committees' Contributions and Congressional Voting*, 39 J.L. & Econ. 603 (1996) 7

TABLE OF AUTHORITIES—Continued

Page

Sunstein, Cass R., *Why Societies Need Dissent* (2003) 4

Troy, Leo, Nat'l Inst. for Labor Relations Research, *Freedom of Choice, Business Climates, and Right to Work Laws* (2006) 6

Varner, Lynne K. & Postman, David, *WEA Suit Follows Dues Dispute*, Seattle Times, Feb. 13, 1997, at B1, *available at* 1997 WLNR 1483331 10

Woldow, Brian J., *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) 8

Zeller, F.C. Duke, *Devil's Pact: Inside the World of the Teamsters Union* (1996) 7

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF was founded 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); and *Cumero v. Pub. Employment Relations Bd.*, 778 P.2d 174 (Cal. 1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, including *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435 (1984), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). PLF attorneys have also published articles on compelled speech issues, including Deborah J. La Fetra, *Recent Developments in Mandatory Student Fee Cases*, 10 J.L. & Pol. 579 (1994). Further, PLF participated as amicus curiae in this case in the Washington

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, its members or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

Court of Appeals and Supreme Court, as well as in this Court in support of the petition for certiorari.

SUMMARY OF ARGUMENT

This Court should hold as a matter of First Amendment law that labor unions must obtain affirmative consent from workers *before* using expropriated funds for purposes of ideological speech or political campaigns. Although the Court has previously declared that it "is not to be presumed" that workers object to such exactions and expenditures. *Hudson*, 475 U.S. at 306 (quoting *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961)), recent history has demonstrated that unions are abusing their powers and spending both union dues and agency shop fees on ideological campaigns without fee payers' consent; are adopting refund procedures designed to deter dissent; and are engaged in a conscious campaign of "massive resistance" against this Court's worker-rights decisions, including *Hudson*, 475 U.S. 292; *Beck*, 487 U.S. 735, and *Abood*, 431 U.S. 209. This Court's position in *Abood* and other cases—that courts should not presume that workers object to the spending of their earnings on political campaigns—is partly responsible for these abuses. The Court should reverse this position and presume that workers dissent, until the state or the union demonstrates otherwise.

Presuming dissent is warranted by basic First Amendment principles. This Court has long held that individuals must not be presumed to have waived their fundamental constitutional rights, *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999), and that the state, not the individual, bears the burden of establishing the constitutionality of laws that infringe on fundamental rights such as speech. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) ("[L]egislative judgments that interfere with fundamental constitutional rights [are] . . . not entitled to the usual presumption of validity, [and] the State rather

than the complainants must carry a 'heavy burden of justification . . . .' "). Placing the burden on workers to assert their objections violates those basic rules of law.

The analysis employed in procedural due process cases such as *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Parratt v. Taylor*, 451 U.S. 527 (1981), as well as the analysis employed in self-incrimination cases like *Miranda v. Arizona*, 384 U.S. 436 (1966), provide helpful templates for this Court to follow. Analogously to those cases, the Court should find that when the state allows a labor union to deduct earnings from a worker's paycheck, it must create a *pre-deprivation* procedure to protect the worker's right to dissent whenever doing so is feasible. The reasons this Court found to justify requiring protective procedures *before* taking a person's life, liberty, or property, are also applicable in a case like this one, in which the state and the union are requiring workers to give up a portion of their earnings to support the union's activities. Requiring affirmative consent is the most efficient method of assuring pre-deprivation protection for workers.

The Washington law challenged here—"section 760"—creates a pre-deprivation requirement that rightly places the burden on the taking entity to demonstrate the legitimacy of its actions before using a worker's earnings for political campaigns. This concrete constitutional guideline is needed to minimize "the risk that [dissenters'] funds will be used, even temporarily, to finance ideological activities" with which they disagree. *Abood*, 431 U.S. at 244. Thus, the decision of the court below should be reversed.

I

DISSENTING WORKERS HAVE AN IMPORTANT FIRST AMENDMENT RIGHT NOT TO CONTRIBUTE TO POLITICAL ACTIVITIES WITH WHICH THEY DISAGREE

The most important part of freedom of expression is the right to disagree. It is dissent, and not conformity, that needs constitutional protection. Conformity is relatively easy to create through political, legal, and social pressures—and it can prevail even in spite of the law—but the nonconformist can only rely on the Constitution for protection. *See, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). To disagree, or to refuse to support institutions with which one disagrees, are often lonely and courageous acts, more in need of legal protection than the right to join or to support an organization or movement. Dissent is by definition counter-majoritarian, which means that dissenters need the security of institutions that shield them from majoritarian political processes. *See, e.g.*, Cass R. Sunstein, *Why Societies Need Dissent* 98 (2003) ("[A]t its core, [the First Amendment] is designed to protect political disagreement and dissent.").

This Court has long recognized that the freedom of expression guaranteed by the First Amendment protects "the decision of both what to say and what not to say," *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 782 (1988), and for that reason has repeatedly upheld the principle that people have the right not to be coerced into subsidizing messages with which they disagree. In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court held that the State of New Hampshire could not prohibit a dissenter from covering up the state motto on his state license plate. In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), it held that agricultural producers could not be required to subsidize a commercial message. And in many cases, the Court has recognized that it

would violate the First Amendment for workers' earnings to be taken by the state, and transferred to labor unions for use in promoting political messages with which the workers disagree. *See Lehnert*, 500 U.S. at 522; *Beck*, 487 U.S. at 745; *Abood*, 431 U.S. at 244. *See also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997) ("[T]he right not to contribute to political causes that they do not favor is as central a First Amendment right as is the right to solicit funds. The protection of this right is certainly at least 'important or substantial,' if not compelling." (citation omitted)).

Dissenting workers in unionized public employers are especially in need of constitutional protections. Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members or non-members from opposing union political activities. *See* Murray N. Rothbard, *Man, Economy, and State* 626 (1970) (1962); Friedrich A. Hayek, *The Constitution of Liberty* 274 (1960); Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 44-46 (2004).[2] Workers often feel either compelled to join the union, or to stifle their dissent, lest their beliefs lead to friction in the workplace, or incur retaliation by union leaders or coworkers. As this Court has recognized, it is particularly important to enforce First Amendment protections in environments where heavy peer pressure might otherwise stifle dissent. *Cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) ("'[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" (quoting *Lee v. Weisman*, 505 U.S. 577, 594 (1992))). *See also NAACP v. State*

---

[2] One indication of the effectiveness of this peer pressure is that after Washington passed section 760, some 83 percent of teachers took advantage of its provisions. R. Bradley Adams, *Note: Union Dues and Politics: Workers Speak Out Against Unions Speaking for Them*, 10 U. Fla. J.L. & Pub. Pol'y 207, 219 (1998).

of Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958); *United States v. Rumely*, 345 U.S. 41, 57 (1953).

The judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982). Workers who disagree with the political views of labor unions are in precisely this situation. They are exposed to social, political, and even legal pressure to conform to the prevailing political atmosphere of the unionized workplace. Protecting their freedom to disagree in such an environment requires this Court strictly to enforce the rights of dissenting workers.

II

LABOR UNIONS HAVE REPEATEDLY ABUSED THEIR POWER TO TAKE WORKERS' EARNINGS

A. Unions Routinely Use Their Authority to Fund Political Campaigns Contrary to Workers' Beliefs

Labor unions spend as much as $800 million per year on political campaigns, more than both the Republican and Democratic parties combined. Chavez & Gray, *supra*, at 29. The exact amount is hard to obtain, however, because unions take pains to conceal the actual figures. According to one rough estimate, unions spent somewhere between $300 million and $500 million on the 1996 election alone. Leo Troy, Nat'l Inst. for Labor Relations Research, *Freedom of Choice, Business Climates, and Right to Work Laws* 3 (2006).[3]

---

[3] *Available at* http://www.nilrr.org/Freedom%20of%20Choice%20and%20Business%20Climates.pdf?storyId=4834393 (last visited Nov. 2, 2006).

These contributions are often contrary to the views of the workers themselves. Although a 1996 poll revealed that 62 percent of union members opposed the AFL-CIO's decision to spend $35 million purchasing advertisements promoting the Democratic party, the union leadership went ahead with the plan. Chavez & Gray, *supra*, at 45. In fact, polls show that at least 30 percent, and perhaps 40 percent, of union members vote Republican. *See Framing the Issue: AFL-CIO: A "Business" in Trouble?*, 2 No. 11 Fed. Emp. L. Insider 5 (July 2005); Paycheck Protection Act, 144 Cong. Rec. H1748 (daily ed. Mar. 30, 1998) (statement of Rep. Cunningham). Yet unions overwhelmingly support the Democratic party. *See* Thomas Stratmann, *How Reelection Constituencies Matter: Evidence from Political Action Committees' Contributions and Congressional Voting*, 39 J.L. & Econ. 603, 604 (1996) ("In the 1980s . . . labor PACs made almost 90 percent of their contributions to Democrats."). Typical of union attitudes toward political spending is a 1996 comment by a Teamsters official: "the union gave $56 million to Clinton . . . after an independent, outside poll the union paid for showed the membership responses preferred Perot, then Bush, with Clinton in third place." F.C. Duke Zeller, *Devil's Pact: Inside the World of the Teamsters Union* 346 (1996).

This dissonance between union workers and their leadership leads to serious abuses when union leaders are empowered to seize workers' earnings and put them to use in political causes which the workers do not support.

B. Workers Are Being Denied the Protections Promised by This Court's Rulings in Dues and Fees Cases

In a series of clear decisions, this Court has held that labor unions may not use union dues or agency shop fees to support political campaigns which workers do not wish to support. *See*

Abood, 431 U.S. at 235; *Beck*, 487 U.S. at 745; *Hudson*, 475 U.S. at 301-02; *Lehnert*, 500 U.S. at 522.

Yet for some 20 years, organized labor is engaged in a campaign of "massive resistance" against these decisions, consciously refusing to follow their mandates, or tailoring their responses to obstruct and frustrate the implementation of workers' rights. *See generally* Jeff Canfield, *What A Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck* and similar cases). *See also Monson Trucking Inc.*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee *Beck* rights notice); *Local 74, Serv. Employees Int'l Union*, 323 N.L.R.B. 289, 290 (1997) (same); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377*, Case No. 8-CB-9415-1, 2004 WL 298352 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights.").

As one expert testified to Congress,

> [t]he first hurdle that employees face [when asserting their rights not to subsidize union political activities] is that they are lied to by union leaders who purport to represent them. I use a stark term, and I mean it. That's right. They are lied to regularly, clearly as a matter of course.

Hearings Before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, on H.R. 3580, The Worker Right to Know Act, Serial No. 104-66 (104th Cong. 2d Sess. 1996) at 111 (Statement of W. James Young).

Even the National Labor Relations Board has been criticized for participating in the unions' campaign of resistance toward worker rights established in *Beck*, *Abood*, and *Hudson*. *See*, *e.g.*, Hearings on H.R. 3580, *supra*, at 88 (Statement of Chairman Fawell: "It's been eight years since *Beck* and the NLRB . . . only recently has issued its first enunciation on the subject. Unbelievable . . . that organized labor should do this to you and that the NLRB should even to a degree, for whatever reason, be a part of the discrimination."); *id.* at 298 (letter from Raymond J. LaJeunesse, Jr.: "the NLRB's General Counsel and the Board itself . . . have failed to prosecute vigorously and enforce strictly worker's rights under *Beck*.").

The NLRB has adopted delay tactics so extreme that some cases asserting workers' rights under *Beck*, *Hudson*, and *Abood* have waited nearly a decade for resolution. *See*, *e.g.*, *American Fed'n of Television & Recording Artists*, 327 N.L.R.B. 474 (1999). *Cf. NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 59 (2d Cir. 1999) ("[T]he Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing."). Only in 1995 did the NLRB first apply the 1988 *Beck* decision, in *California Saw & Knife Works*, 320 N.L.R.B. 224, 224 (1995), a case in which the NLRB determined that when workers demand an audit detailing how much of their money is spent on political campaigning, they are entitled only to the union's in-house audit, and not an independent audit. The District of Columbia Circuit later called this ruling inconsistent with "any rational interpretation" of "*Hudson*'s 'basic considerations of fairness' language." *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997).

Union efforts to circumvent the law are exemplified by the behavior of the Washington Education Association (WEA). *See generally* Michael C. Kochkodin, *A Good Politician Is One That Stays Bought: An Examination of Paycheck Protection Acts and Their Impact on Union Political Campaign Spending*,

2 U. Pa. J. Lab. & Emp. L. 807, 824-29 (2000) (describing WEA's evasive response to section 760). In 1994, knowing that the law challenged in this case would soon take effect and bar the WEA from collecting money to finance political activities from nonconsenting workers, the union collected the upcoming year's assessments in advance. Michael Reitz, *Paychecks Unprotected*, Labor Watch, Jan. 2006, at 3.[4] Then, after the law went into effect, the union "lent" more than $162,000 from its general fund to its political action committee, later forgiving the "loan." *See* Settlement Agreement between State of Washington and WEA, Feb. 26, 1998.[5] The union spent another $120,000 to pay for its political action committee's "administrative costs," without reporting these expenditures, and spent another $730,000 from its general fund to support the passage of two ballot measures. Reitz, *supra*, at 3-4. The union then established a euphemistically named "Community Outreach Program," which raised and spent more than $2 million on political activities without permission from WEA members. Reitz, *supra*, at 4; *see also* Lynne K. Varner & David Postman, *WEA Suit Follows Dues Dispute*, Seattle Times, Feb. 13, 1997, at B1, *available at* 1997 WLNR 1483331. During this time, the full amount of the union's income from dues that had actually been authorized for political expenditures by workers was only about $144,000 per year. Reitz, *supra*.

After an investigation of these activities, the state's Political Disclosure Committee concluded that WEA had violated several sections of the state's campaign finance laws, and urged the Attorney General to take action. *See* Michael W. Lynch, *The Summer of Reform: Campaign Finance Laws*

---

[4] *Available at* http://www.capitalresearch.org/pubs/pdf/LW0106.pdf (last visited Nov. 2, 2006).

[5] *Available at* http://www.atg.wa.gov/pubs/wea_setl.html (last visited Nov. 2, 2006).

Return to the Congressional Agenda, Reason, Aug. 18, 1998, at 7, *available at* 1998 WLNR 4378163.[6] The Attorney General then filed a lawsuit against the union, but settled before trial, in exchange for the union paying a $100,000 fine, agreeing to reduce dues by $5 per member, and promising to abide by a set of permissive "guidelines" under which the union can still transfer dues money from its general fund to its political action committee. *Id.*; *see further* Tom Brown & Ryan Blethen, *State's Campaign Cleanup a Washout?*, Seattle Times, Aug. 3, 1997, at A1, *available at* 1997 WLNR 1453262.

Incidents like this are unfortunately typical of what can only be described as a conscious, bad-faith effort to resist protecting workers' rights. This recalcitrance must not be suffered to continue any longer.

C. Unions Are Engaged in "Massive Resistance" Against This Court's Rulings

In case after case, workers are forced to rely on federal courts to resolve complaints against union rules that unfairly burden their right not to be compelled to subsidize political speech. *See, e.g., Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508 (5th Cir. 1998); *Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842 (7th Cir. 2000); *Cummings v. Connell*, 316 F.3d 886 (9th Cir. 2003); *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 2d 498 (E.D. Va. 2000); *Masiello v. U.S. Airways, Inc.*, 113 F. Supp. 2d 870, 875 (W.D.N.C. 2000); *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987); *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000). Yet unions remain obstinate in refusing to accord workers the rights to which they are entitled. A poll conducted in 1996 revealed that 78 percent of union members were not even aware of their

---

[6] These guidelines are *available at* http://www.atg.wa.gov/pubs/wea_exhibit_a.html (last visited Nov. 2, 2006).

rights under the *Beck* decision, and political leaders since the Reagan Administration have refused to implement *Beck* in a meaningful way. David M. Burns, *Requiring Unions to Notify Covered Employees of Their Right to Be an Agency Fee Payer in the Post Beck Era*, 48 Cath. U. L. Rev. 475, 481-82, 502 n.200 (1999); Hearings, *supra*, at 365. *See also* Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 Harv. J. on Legis. 347, 349 (1998) ("[N]ineteen percent of union members knew they have a right to object to their unions' use of their dues for political purposes."). A 1998 report found that "[g]overnmental enforcement of *Beck* rights . . . has been virtually nonexistent." Robert P. Hunter, Mackinac Ctr. for Pub. Policy, *Paycheck Protection in Michigan* 6 (1998).[7] Nothing has changed since. *See* George C. Leef, *Free Choice for Workers: A History of the Right to Work Movement* 171 (2005); Chavez & Gray, *supra*, at 223.

In their campaign of resistance against this Court's decisions, unions have adopted techniques of bureaucratic delay intended to prevent workers from effectively protecting their rights. For example, in *Office & Prof'l Employees Int'l Union, Local 29, AFL-CIO*, 331 N.L.R.B. 48 (2000), the union promulgated rules requiring an objecting employee to specify exactly the amount of fees she believed were wrongly withheld and what the money had been spent on—information most workers would find too difficult to obtain. Further, the union "treat[ed] the failure to [provide such information] . . . as a waiver of the right to challenge the expenditures." *Id.* at 49. The National Labor Relations Board found that this was unreasonable and arbitrary because "the Union simply place[d] too high a burden on the objector's exercise of her right to challenge the Union's figures." *Id.*

---

[7] *Available at* http://www.mackinac.org/archives/1998/s1998-05.pdf (last visited Nov. 2, 2006).

In *Shea*, too, the Fifth Circuit noted that the procedure created for objecting dissenters was intended to prevent them from vindicating their rights:

> It seems to us that the unduly cumbersome annual objection requirement is designed to prevent employees from exercising their constitutionally-based right of objection, and serves only to further the illegitimate interest of the [union] in collecting full dues from nonmembers who would not willingly pay more than the portion allocable to activities germane to collective bargaining.

154 F.3d at 515.

Organized labor in general, and the WEA in particular, are willing to go to extreme lengths to avoid complying with this Court's rulings regarding workers' rights. Such a systematic pattern of abuse requires firm resolution by this Court, so that the subversion of its authority as expositor of the Constitution does not continue. *Cf. Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 438 (1968) ("This deliberate perpetuation of the unconstitutional . . . system can only have compounded the harm . . . . Such delays are no longer tolerable, for 'the governing constitutional principles no longer bear the imprint of newly enunciated doctrine . . . .' ").

III

THE COURT SHOULD ADOPT A PRESUMPTION OF DISSENT IN LABOR UNION COMPELLED SPEECH CASES

This Court has stated that, although a worker cannot be compelled to support the promulgation of a political message with which she disagrees, nevertheless, a worker's "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Abood*, 431 U.S. at 238; *Hudson*, 475 U.S. at 306 (citation omitted). This conclusion

ought to be overruled. First, it is inconsistent with the longstanding rule that laws infringing on free speech are presumptively invalid, and that individuals are not presumed to have waived fundamental rights. Second, it chills dissent which needs constitutional protection. Third, a presumption of dissent would be logically and legally more consistent with a regime of free speech than the presumption of conformity inherent in the requirement that workers announce their dissent. Finally, abandoning the *Street* presumption of conformity would not implicate *stare decisis* concerns, because it originated in dicta, in cases involving statutory interpretation rather than the First Amendment.

A. Requiring Workers to Assert Dissent Is Inconsistent With the Strict Scrutiny Standard

The requirement that workers affirmatively make known their dissent, which originated in *Street*, 367 U.S. at 774, creates a presumption that workers wish to conform—a presumption which sits uneasily beside the long-standing rule that laws infringing fundamental rights are presumptively invalid. *See Rodriguez*, 411 U.S. at 16 ("[L]egislative judgments that interfere with fundamental constitutional rights . . . . [are] not entitled to the usual presumption of validity . . . [and] the State . . . must carry a 'heavy burden of justification.' "). The presumptive invalidity of laws limiting the freedom of speech means that when the law requires a worker to subsidize political activity, the state (or the union exercising state power) should bear the burden of justifying this law. The individual challenging such a scheme should not.

The presumption of conformity also violates the long-standing rule that courts " 'do not presume acquiescence in the loss of fundamental rights.' " *Coll. Sav. Bank*, 527 U.S. at 682 (quoting *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 307 (1937)). This Court has repeatedly

held that "[t]o preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights," *Glasser v. United States*, 315 U.S. 60, 70 (1942). Among other reasons for presuming against such a waiver are that doing so would too easily blind courts to subtle coercion, or would too easily allow workers, accidentally or through ignorance, to waive vital constitutional liberties. Yet the presumption of conformity created by *Street* requires courts to assume that workers are willing to waive their right to stop their earnings from supporting political speech with which they disagree; that presumption threatens precisely the same harms.

The rule of strict scrutiny, which presumes that laws infringing on free speech are invalid, is based on the extreme importance of free speech in a system of participatory democracy. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *See also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion) ("[T]he First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."). Requiring a worker to affirmatively make known her dissent from being forced to subsidize a union's political activities is to presume that the worker intends to waive that fundamental right, unless the contrary is proven. This inconsistency cannot stand, especially given the importance of protecting a worker's right to dissent.

B. The Presumption That Workers Acquiesce in Supporting Unions Violates the Logical Presumption of Liberty

Presumptions perform important roles in legal thinking: most especially, they allocate the risk of error in the most responsible way, and they protect important interests from disturbance in the absence of a compelling reason for changing the status quo. *See* Murl A. Larkin, *Presumptions*, 30 Hous. L. Rev. 241, 243-44 (1993). In criminal law, the presumption of innocence helps prevent the punishment of the innocent, although it may allow some of the guilty to go free. *In re Winship*, 397 U.S. 358, 363 (1970). Likewise, in the First Amendment context, the presumption against the constitutionality of laws infringing on freedom of expression is justified by the fact that more speech is to be preferred over less speech. *Cf. Texas v. Johnson*, 491 U.S. 397, 419 (1989) ("'[T]he remedy [for untruth] is more speech, not enforced silence.'" (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))). *See also* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 128 ("[T]he thumb of the Court [must] be on the speech side of the scales.").

The text of the Constitution warrants a general presumption that individuals may act freely unless and until those seeking to limit their freedom provide convincing justification for doing so. *See generally* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004). For example, the Fifth and Fourteenth Amendments prohibit government from "depriv[ing]" individuals of certain rights, and the First Amendment declares that the freedom of speech shall not be "abridged"—terms which imply that governmental authority must be regarded as secondary to, and limited by, the basic presumption that "in pursuing happiness, persons may do whatever is not justly prohibited." *Id.* at 268. Although the case was later overruled with regard to certain

"non-fundamental" freedoms, the Court's words in *Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525, 546 (1923), remain true with regard to free speech: freedom, the Court said, is "the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." *See also Lawrence v. Texas*, 539 U.S. 558, 574-75 (2003) (liberty is to be presumed, and abridged only where legitimate justification exists).

One important reason courts should presume in favor of individual liberty until the state justifies its interference with that liberty is that individuals are often unable to articulate their reasons for exercising their liberty in certain ways. They may be intimidated, uneducated, or only partly aware of their own reasons. Yet this does not mean that their actions fall outside the range of their legitimate freedoms. An artist, for example, may be unable to explain his work in precise language, yet his freedom of expression is not therefore less protected. Supporters of politically unpopular causes may not wish to disclose their identities or their reasons, out of fear of retaliation, or for any other reasons. Yet the state may not require organizations to divulge the identities of its supporters. *Patterson*, 357 U.S. at 462-63. Perhaps more to the point, to have a right means to be free to act or refrain from acting, without being required to give a reason.

Moreover, a presumption that a worker wishes to dissent makes logical sense as a background rule for deciding cases. In the relationship between the worker and the union, the original position is that the union may not take the worker's earnings. This Court has held that unions have no constitutional right to deduct dues or shop fees from workers' paychecks. *Beck*, 487 U.S. at 749-50; *see also Ky. Educators Pub. Affairs Council v. Ky. Registry of Election Fin.*, 677 F.2d 1125, 1134 (6th Cir. 1982) ("[The union] has no constitutional right to a check-off or payroll deduction system for political fund

raising."). Any deviation from the original position must be justified by the party seeking to alter it, under the classic rule "*ei incumbit probatio qui dicit, non qui negat*" (i.e., "the burden is upon the one who asserts, not the one who denies"). *See further United States v. U.S. Gypsum Co.*, 67 F. Supp. 397, 446-48 (D.D.C. 1946), *overruled on other grounds*, 333 U.S. 364, 388 (1948); 1 Simon Greenleaf, *Evidence* § 74 at 103 (10th ed. 1860). Logic requires that the party seeking to alter the *status quo* bear the burden of justifying such an alteration. *See* Anthony de Jasay, *Justice and Its Surroundings* 150-51 (2002). Here, this burden means that the union must provide justification for interfering with a worker's right to her pay. The Court has allowed states to alter the *status quo* in certain limited circumstances, by granting unions the privilege of deducting fees directly from non-members paychecks, but in the absence of justification, workers cannot be required to subsidize the union. A presumption of dissent parallels this basic logical schema.

Presuming in favor of dissent with regard to workers makes constitutional, logical, and legal sense. A worker with the right not to support a political speaker should not be required to provide reasons for refusing to do so. The Constitution does not require speakers to give reasons for speaking or remaining silent; because such a requirement would "abridge" the freedom of expression; because such articulation is sometimes difficult for the speaker; and because forcing a person to account for her decision to exercise a freedom is to fundamentally change the nature of that freedom from a right into a permission.

C. Requiring Workers to Assert Objection Chills Dissent

It appears that the *Hudson* Court hoped to minimize the inconsistency between strict scrutiny and the *Street* presumption of conformity when it remarked that the burden on a worker is

"simply" to make her objection known. *Hudson*, 475 U.S. at 306 n.16. But of course, this is precisely the burden that is indefensible, given this Court's refusal to presume that a person has waived her constitutional rights.

Nor is the *Street* requirement a "simple" matter. Given the pressure to conform that unions exert, as well as their record of violence against nonconforming workers, *see, e.g.*, Chavez & Gray, *supra*, at 139-58, it is often extremely difficult and even dangerous for dissenting workers to voice their objection to union policies. *Id.*; *see also* Leef, *supra*, at 38-40. Requiring workers affirmatively to assert their objections, instead of requiring unions to obtain consent from workers who support the union's efforts, only exacerbates the social pressure that chills dissent in the workplace. There is a constitutional dimension to this chilling effect, because, as this Court has recognized, government can employ a combination of state action and private action so as to pressure dissenters and violate essential First Amendment interests. In *Patterson*, 357 U.S. 449, the state tried "simply" to require the NAACP to disclose its membership lists. The Court recognized that there was nothing "simple" about it:

> [C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as . . . governmental action . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Ass'n v. Douds*, [339 U.S. 382, 402 (1950)]: "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." Compelled disclosure of membership in an organization engaged in advocacy

> of particular beliefs is of the same order. *Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.*

Id. at 462 (emphasis added). For similar reasons, requiring a worker to make her objections known requires a worker to draw attention to herself, and the possibility of retaliation and hostile treatment. Although an opt-in provision need not guarantee anonymity, it would help prevent the union from using a combination of government and social pressures to stifle dissident beliefs.

The *Patterson* Court cited Justices Douglas and Black's concurring opinion in *Rumely*, 345 U.S. at 57, as a further example of the combination of government and private action that can stifle freedom of speech. There, the Justices warned that requiring the press to identify its customers to the government on demand would lead to an alarming chilling of speech, because dissenters would "be subjected to harassment that in practical effect might be as serious as censorship." *Id.* Although "no legal sanction [was] involved" in the bookseller's refusal to disclose the information, "the potential restraint [was] . . . severe." *Id.*

Workers who do not wish to have their earnings taken from them to support political speech should not be forced to state their objections before exercising their right not to speak. Such a requirement forces dissidents to mark themselves for potential harassment and retaliation in a way that an "opt-in" requirement would not. Although workers who choose not to "opt-in" would not remain anonymous, the ability to make their decisions in private and register those decisions before a political campaign begins would protect them from the individual exposure and peer pressure that the current

presumption of conformity enshrines. The current presumption stifles dissent and ought to be overruled.

D. Abandoning the Requirement That Workers Affirmatively Object to the Spending of Their Money on Political Campaigns Would Not Implicate *Stare Decisis*

1. The *Street* Presumption of Conformity Was Dicta

The presumption of conformity originated in dicta in *Street*, and therefore does not implicate *stare decisis* concerns. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626 (1935). *Street* was a statutory interpretation case, in which the Court held that the Railway Labor Act did not authorize unions to spend members' dues on political speech with which workers disagreed. The Court declared that "[t]he safeguards of [section] 2, Eleventh [of the Act] were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." 367 U.S. at 774. Thus the requirement of asserting an objection was statutory, not constitutional. *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen*, 373 U.S. 113, 119 (1963), was also a statutory interpretation case involving the Railway Labor Act.

In *Abood*, the Court appeared to recognize that the language in *Street* was dicta, when it held that workers are not required to identify with precision which political candidates and causes they wish not to support. *Abood*, 431 U.S. at 241. Such an exacting requirement "would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure," the Court noted. *Id.* "It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are

unrelated to its duties as exclusive bargaining representative." *Id.*

It was not until *Hudson* that this Court stated that "the nonunion employee has the burden of raising an objection" as a constitutional matter, 475 U.S. at 306, but even this was not essential to the holding in *Hudson*, which was that the procedures adopted by the union for dealing with objections was unreasonably burdensome. *See id.* at 309. Thus the Washington Supreme Court erred in finding that this Court "has placed the burden on the dissenting nonmember to assert his or her First Amendment rights." *State ex rel. Washington State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 130 P.3d 352, 359 (Wash. 2006). In fact, this Court has simply held that the Railway Labor Act requires a worker to assert her rights, and, in *Hudson*, adopted regrettably imprecise language suggesting that the First Amendment requires workers to assert their objections. This dicta warrants no *stare decisis* effect.

2. Even if the Presumption of Conformity Is a Rule of Law, It Should Be Overruled

Even if it is not dicta that workers must bear the burden of asserting their objections to the spending of their monies on political campaigns, this Court should overrule that requirement. "Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great." *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965).

First, in the realm of constitutional interpretation, considerations of *stare decisis* are at their weakest. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). As the Court in *McLean Credit Union* noted, it is appropriate to overrule previous decisions when intervening changes have

"removed or weakened the conceptual underpinnings from the prior decision." *Id.* at 173. This has happened with regard to the presumption of conformity created by *Street* and other cases: the unions' purposeful evasion of this Court's workers' rights decisions has proven that presumption to be unworkable.

In *Lawrence*, the Court held that it is appropriate to overrule a prior decision when it "does not withstand careful analysis," which the *Street* presumption does not. *Lawrence*, 539 U.S. at 577. In addition, there has been no individual or social reliance on the presumption of conformity that would justify continuing to require workers to assert their objections rather than requiring unions to justify the taking of worker's earnings for political purposes. *Cf. id.* Many workers are unaware of the rules governing agency shop fees and union dues, and have no settled expectations with regard to them. While some unions have come to rely on the presumption of conformity, that reliance has led to abuse. Finally, in overruling a prior decision, the *Lawrence* Court found that the older case "itself cause[d] uncertainty, for the precedents before and after its issuance contradict its central holding." *Id.* The same can be said of the *Street* presumption. *Abood*, *Hudson*, and other cases have repeatedly found that labor unions have adopted burdensome procedures to restrict the rights of workers. In *Hudson*, 475 U.S. at 306 n.16, the Court sought to minimize the *Street* presumption, by declaring that it "simply" required a worker to assert an objection, which again demonstrates the essential unworkability of the presumption of conformity. And the Court found that the burden imposed by the union on workers asserting their objections was, indeed, too severe.

Considerations of *stare decisis* should not lead this Court to require workers to assert their objection to the taking of their earnings for the subsidizing of union political speech. The burden ought to rest with the union to obtain consent at the outset.

IV

PROCEDURAL DUE PROCESS CASES SUGGEST THE KIND OF PROTECTIONS THIS COURT OUGHT TO ADOPT IN COMPELLED SPEECH CASES LIKE THIS ONE

Requiring the union to obtain consent from workers before taking their earnings for political purposes is warranted by the presumption against the waiver of fundamental rights; by the strict scrutiny applied when state laws interfere with First Amendment rights; by basic standards of logic; and by the principles of fundamental fairness protected by several other clauses of the Constitution. Cases addressing these other clauses offer useful guidance in this case as well.

A. When Taking Property or Liberty from Citizens, Due Process Requires a Pre-Deprivation Procedure Whenever Feasible

When government intends to deprive a person of a liberty or property right or even a benefit, the Due Process Clause requires the government to observe certain procedures to ensure that the person has a fair opportunity to object, present her side of the story, and otherwise defend her interests. "The fundamental requirement of Due Process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that when government intends to terminate welfare benefits, it must accord the recipient a pre-termination hearing. Protecting persons against "grievous loss," *id.* at 263, is best effected by providing such a hearing, because the risk of erroneous deprivation outweighs the benefit to the state that would be

gained by providing only a post-deprivation opportunity to be heard. *Id.* at 263.

In *Parratt*, 451 U.S. 527, this Court explained that a post-deprivation proceeding may satisfy the Due Process Clause when "the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process [is] coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial [deprivation]." *Id.* at 539. The Court emphasized that only "impracticability" would justify dispensing with a pre-deprivation hearing. *Id.* at 540. In *Parratt*, for example, the petitioner complained of the negligent loss of his toy model kit, which was a "random and unauthorized act by a state employee." *Id.* at 541. It was "difficult to conceive" of how the state could provide a pre-deprivation hearing to prevent such harm. *Id.*

Goldberg, *Mathews*, and *Parratt* require that, when the state proposes to take property, it must provide a person with an opportunity to object *before* the deprivation, unless doing so would be "impracticable," *Parratt*, 451 U.S. at 541, or where some exigency requires speedy action by the state. *Id.* at 539. The state may also substitute a post-deprivation remedy when the burden on the state would be severe, and the risk of serious harm to the injured party is not significant. *Mathews*, 424 U.S. at 333.

Although the present case is not a Due Process case, these decisions provide useful guidance when determining whether the *Street* presumption of conformity satisfies the demands of the First Amendment. The risk of harm here is significant—as this Court recognized in *Hudson*, the First Amendment does not tolerate the risk that a worker's money might be used, even temporarily, to subsidize speech with which the worker disagrees. Only a minimal burden would be imposed on the state if unions are required to obtain consent from workers

before spending such exactions on political campaigns. *Cf. Ellis*, 466 U.S. at 444 ("[A]lternatives, such as advance reduction of dues . . . place only the slightest additional burden, if any, on the union."); *Miller*, 103 F.3d at 1253 ("An annual mailing to a union's contributing members, asking them to check a box and to return the notice to the union, would seem to suffice under the statute."). And no exigency requires speedy action by the state. All of the reasons this Court has found to justify requiring *pre*-deprivation procedures are present in this case, militating in favor requiring unions to obtain permission from workers *before* employing state power to take workers' earnings for funding political expression.

B. Requiring Workers to "Opt-In" Is the Most Effective "Concrete Constitutional Guideline" for Assuring Pre-Deprivation Protection for Workers

The most efficient way to provide a worker with protection and to abide by basic considerations of fairness is to adopt an "opt-in" requirement like the one embodied in section 760. Employing a presumption of dissent, and thus requiring unions to obtain consent *before* spending worker's money on political expression, would be an effective, inexpensive concrete constitutional guideline protecting workers' rights.

This Court has a long history of requiring such prophylactic devices as a means of securing important individual rights. Another helpful analogy is the requirement established in *Miranda*, 384 U.S. 436, as a means of protecting the freedom from self-incrimination in an age of "modern custodial police interrogation." *Dickerson v. United States*, 530 U.S. 428, 434 (2000). In *Dickerson*, the Court affirmed *Miranda*'s prophylactic requirement as a constitutional rule ensuring against the violation of an arrestee's right against self-incrimination. "[T]he advent of modern custodial police

interrogation," the Court found, "brought with it an increased concern about confessions obtained by coercion," *Dickerson*, 530 U.S. at 434-35. This heightened risk of Fifth Amendment violations warranted the implementation of "'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" *Id.* at 435 (quoting *Miranda*, 384 U.S. at 442).

A similar situation is presented here. Allowing unions to adopt post-deprivation remedies, such as administrative hearings and rebates, has not succeeded in protecting the rights of workers. The advent of modern union funding—through direct paycheck deductions, as opposed to requiring overt payment by a worker—as well as the conscious effort by unions to evade the requirements of this Court's decisions, bring with them an increased "risk that [dissenters'] funds will be used, even temporarily, to finance ideological activities" with which they disagree. *Abood*, 431 U.S. at 244. The Court should adopt a concrete constitutional guideline for unions and states to follow which will prevent violations of workers' First Amendment right not to subsidize union political activities.

The simplest and most efficient guideline available is to require unions to obtain affirmative consent from workers before taking their money for political activity. In *Miller*, 103 F.3d at 1253, the Sixth Circuit rejected a union's challenge to an "opt-in" requirement, pointing out that it served an important state interest in protecting the rights of the dissenting minority, and ensuring "that political contributions are in accordance with the wishes of the contributors." 103 F.3d at 1253. Moreover, the Court found that it "border[ed] on the frivolous" to claim that requiring workers to consent would impose a severe burden on the union. *Id.* at 1253. More importantly, whatever burden it imposes on the union is well justified, because it is the union that seeks to take the workers' funds for political purposes. It is legitimate to require it to bear the burden of assuring that it does so in a constitutional manner.

CONCLUSION

Washington's section 760 embodies important First Amendment principles. In practice, the most effective way to secure the First Amendment rights of dissenting workers is to require unions to obtain consent *before* taking workers' earnings for political expression. The Court should adopt this requirement as a concrete constitutional guideline under the First Amendment, and uphold the constitutionality of section 760. The decision of the Washington Supreme Court should be *reversed*.

DATED: November, 2006.

Respectfully submitted,

DEBORAH J. LA FETRA
TIMOTHY SANDEFUR
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation